United States Court of Appeals

for the Second Circuit

APPENDIX

Docket No.

75-7652

IN THE UNITED STATES COURT OF APPEALS FOR

THE SECOND CIRCUIT

DONALD M. KINSELLA,

Appellant,

B

-against-

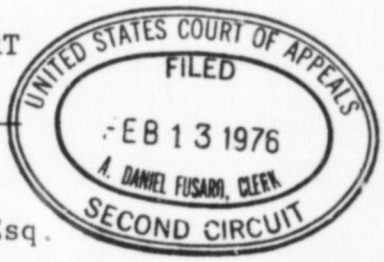
BOARD OF EDUCATION OF THE CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

DOCKET NO.

75-7652

Appellees.

APPEAL FROM ORDERS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK



APPENDIX

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4

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Relevant Docket Entries	vi
Summons	1
Complaint of the Plaintiff-Appellant	2
Exhibit A - Notice of Determination of Probable Cause	10
Exhibit B - Statement of Charges Against Donald M. Kinsella	12
Exhibit C - Request by Tenured School District Employee for a Hearing	14
Exhibit D - Letter Goodrich to Kinsella Dated March 15, 1973	15
Exhibit E - Principal Participant List Dated April 3, 1973	16
Notice of Motion for Temporary Restraining Order	17
Motion for Temporary Restraining Order and Preliminary Injunction	18
Affidavit of Donald M. Kinsella Sworn to April 19, 1973	20
Notice of Motion for Order Dismissing the Complaint	23
Affidavit in Opposition to a Motion for a Temporary Restraining Order, Preliminary Injunction and Convening of a Three Judge Court and in Support of the Motion to Dismiss	24
Answering Affidavit by Thomas L. David, Esq., Sworn to April 30, 1973	27

	Page
Temporary Restraining Order Enjoining the Holding of A Hearing (Granted and Entered May 8, 1973)	29
Affidavit of M. Duane Mongerson Sworn to May 25, 1973	31
Order Requesting the Convening of a Three Judge Court and Granting a Preliminary Injunction (Granted and Entered June 19, 1973)	34
Answer of Defendant Board of Education	44
Answer of Defendant Nyquist	45
Affidavit of M. Duane Mongerson Sworn to September 13, 1973	47
Exhibit - Policy on Corporal Punishment Dated April 26, 1961	49
Exhibit - Rules on Corporal Punishment Dated May 11, 1961	50
Exhibit - Policy on Corporal Punishment Dated November 16, 1972	51
Exhibit - Rules on Corporal Punishment Dated November 16, 1972	52
Transcript of Proceeding Held Before the Three Judge Panel at the United States Court House, Buffalo, New York on September 14, 1973	53
Decision of Three Judge Federal Panel Granted and Entered February 19, 1974 as Amended	138

Page

Notice of Motion and Motion for Supplementary Relief Pursuant to 28 U.S.C. §2202 (Motion I) 152

Affidavit of Bernard F. Ashe, Esq., Sworn to November 22, 1974 154

Exhibit A - The Reported Text of the Three Judge Panel Decision (378 Fed. Supp. 54. 161

Exhibit B - Letter Dated February 20, 1974 - Ashe to Nyquist 168

Exhibit C - Principal Participant List 170

Exhibit D - Amendment to Regulations of the Commissioner of Education 171

Exhibit E - Memo Dated March 5, 1974 - Longo to Participants in Pending Proceedings Under Education Law §3020-a 172

Exhibit F - Memo Dated March 13, 1974 - Bellas to Smith and Various Other Participants in the Tenure Hearing 174

Exhibit G - Panel Report Dated June 21, 1974 175

Exhibit H - Determination of the Board of Education Dated July 25, 1974 179

Affidavit in Opposition by Douglas S. Cream, Assistant Attorney General of the State of New York, Sworn to on November 27, 1974 181

Page

Exhibit 1 - Commissioner's Regulations (8 N.Y.C.R.R. §§ 82.10 and 82.11) 184

Notice of Motion for Supplementary Relief 28 U.S.C. 2202 Dated November 22, 1974 (Motion II) 185

Motion Dated November 22, 1974 187

Affidavit of Donald M. Kinsella in Support of the Motion for Supplementary Relief Sworn to on November , 1974 189

Exhibit A - A Copy of the Three Judge Panel Decision (See pg. 161) 197

Exhibit B - Amendments to the Regulations of the Commissioner of Education (See pg. 171) 197

Exhibit C - Panel Report Dated June 21, 1974 (See pg. 175) 197

Exhibit D - Determination of the Board of Education Dated July 25, 1974 (See pg. 179) 197

Affidavit in Opposition of Thomas L. David, Esq. Sworn to on December 5, 1974 198

Petitioner's Memorandum of Law in Support of his Motion for Supplementary Relief (Motion I) Dated December 5, 1974 201

Plaintiff's Memorandum of Law in Support of His Motion for Supplementary Relief (Motion 2) Dated December 6, 1974 256

Appendix A - Statement of Charges Against Donald M. Kinsella 283

Brief on Behalf of Sweet Home Central School Dated December 20, 1974 285

Page

Letter Brief on Behalf of Defendant Nyquist Dated January 17, 1975 290

Reply Memorandum of Law on Behalf of the Plaintiff in Support of His Motions for Supplementary Relief Dated January 31, 1975 293

Transcript of Proceedings Before the Honorable John T. Curtin, United States District Judge, in Part I, United States Court House, Buffalo, New York, on February 25, 1975 (Granted and Entered October 21, 1975) 303

Decision of Judge Curtin Granted and Entered October 21, 1975 357

Judgment Dated October 21, 1975 (Granted October 21, 1975 and Entered October 24, 1975) 372

Notice of Appeal Dated November 14, 1975 373

RELEVANT DOCKET ENTRIES

DATE		
1973		
April 19	(1)	Filed Complaint Issued Summons - 3 copies
April 19	(2)	Filed Notice of Motion for temporary restraining order and preliminary injunction and requesting convening of 3-judge court for consideration of preliminary injunction, returned 4/30/73
April 19	(3)	JS 5 made.
April 24	(4)	Filed Affidavits of Service of Notice of Motion, Motion & Affidavit on Board of Education and state.
April 27	(5)	Filed defendant's Notice of Motion and Affidavit in opposition and in support of Motion to Dismiss, returned 4/30/73.
April 30	(6)	Court requests briefs and replies and after oral argument the court stayed hearing before panel for 3 weeks.
May 3	(7)	Filed Summons and Marshall's Return on Summons and Complaint served 4/27/73 on State Education Department, on 4/30/73 on James Finch., Superintendent of Schools.
May 8	(8)	Filed Order that defendants, etc., be enjoined from holding hearing scheduled for 5/2/73 and from any way changing or affecting plaintiff's employment with defendant Board of Education until 5/23/73 or until such time as there has been a judicial determination of plaintiff's motion and application. Henderson DJ, Notice and copies Fudeman and Renaldo; Louis J. Lefkowitz and Gross, Shuman, etc.

May 25	(9)	Filed Defendant's Central School District Affidavit in opposition to Temporary Restraining Order.
June 19	(10)	Filed Order that Chief Judge of U.S. Court of Appeals for 2nd Circuit requested to convene 3-judge court and pending convening of same, defendants are enjoined from any further proceedings against plaintiff. Henderson, District Judge. Notices and copies to Messrs. Ashe, David and Lefkowitz.
July 2	(11)	Filed Designation of Judges, i.e. J. O. Henderson, James L. Oakes and J. T. Curtin signed by Irving R. Kaufman, Chief Judge USCA 2nd Circuit, Notice and copies to Messrs. Ashe, Tabachnick, Gross, et al, and Lefkowitz.
August 23	(12)	Filed decision and order for hearing set for 9/14/73 before 3-judge court. Henderson, District Judge. Notice and copies to Bernard F. Ashe, James R. Sandner, Thomas L. David, Douglas S. Cream and James S. McAskill.
August 24	(13)	Filed Defendant Board of Education of Central School District No. 7 Answer.
August 28	(14)	Filed Defendant Ewald B. Nyquist Answer.
Sept. 14	(15)	After oral argument the decision was reserved, but the stay was continued.
Sept. 14	(16)	Filed Affidavit of M. Duane Mongerson, President of Defendant Board of Education.
Nov. 21	(17)	Filed Court Stenographers minutes of 9/14/73.

1974

Feb. 19	(18)	Filed order that 3-judge court declares Section 302-a of the Education Law of the State of New York, absent Administrative regulations requiring decision to be based upon evidence elicited before the hearing panel and the decision of the Board to set forth the reasons and factual basis therefor, is unconstitutional, and the defendants are enjoined from its enforcement until such time as appropriate administrative or legislative action is taken to remedy the defects in the procedures here involved. Judges Oakes, Henderson and Curtin. Notice and copies to Messrs. Ashe, McAskill, David, Cream and Tabachnick, Gross, Shuman, Wiltse and Laub.
Feb. 20	(19)	Filed order amending order dated 2/19/74 next to last sentence on page 9 as set forth. Curtin, District Judge. Notice and copies to Messrs. Ashe, Sandner, McAskill, David and Cream.
Nov. 22	(20)	Filed Plaintiff's Notice of Motion and Motion for supplementary relief returnable 12/9/74.
Nov. 22	(21)	Filed Plaintiff's Notice of Appearance as local counsel as Emanuel Tabachnick.
Nov. 29	(22)	Filed Defendant's Ewald B. Nyquist, Affidavit in Opposition.
Dec. 6	(23)	Filed Plaintiff's Notice of Motion and Motion for supplementary relief, returnable 12/9/74.
Dec. 6	(24)	Filed Affidavit of Service of Motion on James McAskill on 11/26/74.
Dec. 6	(25)	Filed Affidavit of Service of Motion on Louis J. Lefkowitz on 11/26/74.
Dec. 6	(26)	Filed Affidavit of Service of Motion on Thomas L. David on 11/26/74.

Dec. 6	(27)	Filed Affidavit in Oppositon of Defendant Board of Education of Sweet Home School District of Amherst and Tonawanda.
Dec. 9	(28)	Filed Plaintiff's Memorandum of Law in support of motion for supplementary relief (Motion I based on the affidavit of Bernard F. Ashe).
Dec. 9	(29)	Filed Plaintiff's Memorandum of Law in support of motion for supplementary relief (Motion II based on the affidavit of Donald M. Kinsella).
Dec. 9	(30)	Argument on motion. Court set defendant's brief due 12/30/74 - submitted.
Dec. 27	(31)	Filed brief on behalf of Sweet Home Central School (Board of Education of Central School District No. 7) on plaintiff's motion for supplementary relief.
1975		
Jan. 13	(32)	Plaintiff's reply brief due. Adjourned to 1/20/75 for defendant's brief. Plaintiff may reply to defendant's reply by 2/3/75. Oral argument to be held on 2/10/75 at 2:00 p.m.
Jan. 20	(33)	Defendant's brief due. Submitted.
Jan. 20	(34)	Filed Letter Brief of Defendant Ewald B. Nyquist in opposition to Plaintiff's motion.
Feb. 3	(35)	Plaintiff's reply brief due. Adjourned to 2/10/75; Adjourned to 2/25/75 at 2:00 pm.
Feb. 4	(36)	Filed Reply Memorandum of Law on behalf of plaintiff in support of motions for supplementary relief.

Feb. 25	(37)	Motion by plaintiff for supplementary relief. Decision reserved.
July 14	(38)	Filed Court Stenographer's transcript of proceedings on 2/25/75.
Oct. 21	(39)	Filed Decision and Order denying plaintiff's motions for supplementary relief. Curtin, District Judge. (Notice and copy to Messrs. Ashe, Sandner, David and Lefkowitz, Buffalo and Ohlin, Damon, Morey, Sawyer and Moot).
Oct. 24	(40)	Filed judgment denying both of plaintiff's motions for supplementary relief - Clerk Notice and copies to Messrs. Ashe, Sandner, David and Lefkowitz, Buffalo and Ohlin, Damon, Morey, Sawyer and Moot.
Oct. 24	(41)	JS 6 made.
Nov. 19	(42)	Filed Plaintiff's Notice of Appeal (copy mailed to Messrs. David, McAskill and Lefkowitz, Buffalo, and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Ashe).

SUMMONS

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-61)
(Formerly D.C. Form No. 15a Rev. 6-49)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. ——

DONALD M. KINSELLA
1266 Ellicott Creek Road
Tonawanda, New York

Plaintiff

v.

EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK
State Education Building
Albany, New York 12224

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon **BERNARD F. ASHE, ESQ.**

plaintiff's attorney , whose address **80 Wolf Road, Albany, New York 12205**

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk.

Date: **April ,1973**

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

COMPLAINT OF THE PLAINTIFF-APPELLANT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

CIV-1973-187
Civil Action No.
COMPLAINT

Now comes the plaintiff, Donald M. Kinsella, by and through his attorney and alleges for his complaint in this action as follows:

1. That this action arises under the Fourteenth Amendment to the Constitution, and this court has jurisdiction over it pursuant to 28 U.S.C. §1343 (3), 28 U.S.C. §2281 and §2284, and 42 U.S.C. §1983.

2. That the defendant Board of Education of Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County (Sweet Home Central School District) is a properly constituted Board of Education with offices at 1901 Sweet Home Road, Amherst, New York.

3. That the defendant, Ewald B. Nyquist, Commissioner of Education of the State of New York has his office in the Department of Education, Education Building, Albany, New York. Said defendant is the chief administrative officer of the Department of Education and is appointed by and serves at the pleasure of the Board of Regents of the State of New York.

4. That plaintiff is an adult and resides at 1266 Ellicott Creek Road, Town of Tonawanda, County of Erie, State of New York.

5. That plaintiff has been employed by the defendant Board of Education as a physical education and health education instructor for fourteen years and that the plaintiff has tenure.

6. That Dr. James M. Haught, the principal of the Senior High School of Sweet Home Central School District, and in his capacity as principal, by letter dated March 1, 1973, filed charges against the plaintiff with the defendant Board of Education pursuant to the provisions of §3020-a of the Education Law of the State of New York.

7. That, by notice dated March 6, 1973, attached hereto as Exhibit "A", defendant Board of Education through its District Clerk, C. Leon Smith, advised plaintiff that it had found, during an executive session on March 5, 1973, probable cause for the charges preferred by Dr. James M. Haught.

8. That said notice indicated that it was issued pursuant to Chapter 717 of the Laws of 1970 of the State of New York which amended §3012 of the Education Law of the State of New York and enacted §3020-a of the Education Law of the State of New York, and; that accordingly the notice and actions of the defendant Board of Education are being taken pursuant to §3012 and §3020-a of the Education Law of the State of New York.

9. That said notice was accompanied by a copy of the charges on which the defendant Board of Education found probable cause. Said charges are attached hereto as Exhibit "B." Paragraph number five (5) of said charges provides that "the incidents in paragraph one, two and three were part of a pattern of conduct which indicates that Mr. Kinsella is not able to perform his duties as a teacher without the use of excessive corporal punishment. That inability, together with the finding by the Board of Education and finding of an impartial panel, empaneled pursuant to

3.

§3020-a of the Education Law, that Mr. Kinsella on February 9, 1971 engaged in conduct unbecoming a teacher indicates that Mr. Kinsella is incompetent to serve as a teacher."

10. That said notice advised the plaintiff that "within five days of receipt of these charges you must elect to request a hearing before a three member panel, or waive your right to such a hearing. Should you fail to so request or to waive within the specified days the school clerk will request the Commissioner to schedule a panel hearing on your behalf as required by law."

11. That plaintiff requested a hearing by Form 717-2, attached hereto as Exhibit "C", on March 7, 1973.

12. That §3020-a of the Education Law of the State of New York requires the defendant Commissioner of Education to schedule a hearing when one is requested and to forward a report of such a hearing once held to the employee and the clerk of the employing board. Accordingly, the defendant Commissioner of Education is acting pursuant to §3020-a of the Education Law of the State of New York.

13. That the defendant Commissioner of Education by letter dated March 15, 1973, attached hereto as Exhibit "D", advised plaintiff that a hearing pursuant to §3020-a of the Education Law of the State of New York was scheduled for April 10, 1973, to be held at the Holiday Inn, 1881 Niagara Falls Boulevard, Tonawanda, New York. Said hearing is now scheduled to take place on May 2, 1973.

14. That a note dated April 3, 1973 attached hereto as Exhibit "E" changed the place of the hearing and indicates that the complainant, Dr. James M. Haight, is represented by Thomas L. David, Esq., who is the attorney for the defendant Board of Education and that, therefore, the defendant Board of Education is in fact prosecuting the charges against the plaintiff.

15. That §3020-a(2) of the Education Law of the State of New York permits the suspension of the plaintiff pending "a hearing on the charges and determination thereof."

16. That §3020-a (4) of the Education Law of the State of New York provides in part that "within five days of the conclusion of a hearing held under this section, the Commissioner of Education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal."

17. That the report and recommendations of the panel, issued pursuant to Section 3020-a have been consistently interpreted to be merely advisory upon the employing board, that the employing board may reject, modify or accept said findings and recommendations and that, accordingly, the plaintiff alleges that the defendant Board of Education, as a governmental entity, and his employer, must provide him with a due process hearing before his employment relationship can be adversely affected on the basis of the charges filed herein against the plaintiff.

18. That plaintiff alleges that his right to engage in his chosen occupation of teaching is a fundamental right inherent in the concept of liberty and that he cannot be deprived thereof without due process of law.

19. That plaintiff alleges that his status as a tenured teacher constitutes property of which he cannot be deprived without due process of law.

20. That §3020-a (2) of the Education Law of the State of New York deprives plaintiff of liberty and property without due process of law in that

said statute permits the suspension of the plaintiff without a prior hearing.

21. That §3020-a of the Education Law of the State of New York deprives the plaintiff of due process of law in that the prosecution of the charges preferred against him pursuant to the statute will in fact be by the defendant Board of Education since said defendant's attorney is also the attorney representing the complainant and in that the decision on the charges preferred against the plaintiff will in fact be made by the same Board of Education, presumably with the advice of counsel.

22. That §3020-a of the Education Law of the State of New York deprives the plaintiff of liberty and property without due process of law in that the decision on the charges preferred against him pursuant to the statute will in fact be made by the defendant Board of Education which is not an impartial body since said defendant made the determination of probable cause with respect to the same charges, as the defendant was required to do by said statute, and since the defendant Board of Education is in fact prosecuting the charges.

23. That §3020-a of the Education Law of the State of New York deprives the plaintiff of liberty and property without due process of law in that the decision on the charges preferred against him pursuant to the statute will in fact be made by the defendant Board of Education which is not an impartial body since said defendant was the same board that made a prior finding of conduct unbecoming a teacher against the plaintiff and was improperly influenced by that finding in reaching its determination of probable cause in the instant case. Accordingly, said Board will be similarly influenced in making its findings of fact in this case.

24. That §3020-a of the Education Law of the State of New York deprives the plaintiff of liberty and property without due process of law in that

the decision on the charges preferred against him is in fact made by the defendant Board of Education without an opportunity for a hearing before said Board of Education prior to any decision on said charges, where plaintiff would be given an opportunity to defend himself before said Board of Education, to testify in his own behalf before said Board of Education, to confront his accuser before said Board of Education, to be represented by counsel, to present witnesses before said Board of Education, and to cross-examine witnesses.

25. That §3020-a of the Education Law of the State of New York distinguishes between teachers who have tenure under the Education Law and those who do not have tenure and only affords protection to teachers with tenure.

26. That §3020-a of the Education Law of the State of New York violates the Equal Protection Clause of the Fourteenth Amendment because the distinction it draws between nontenured and tenured teachers impinges upon the fundamental right to engage in the occupation of teaching and is not justified by any compelling state interest.

27. That §3012 of the Education Law of the State of New York provides in pertinent part that "Such persons [tenured teachers] shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) Insubordination, immoral character or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty..."

28. That §3012 of the Education Law of the State of New York is a vague and indefinite statute having no guidelines for its application in either other statutes or rules or regulations of the defendant Board

of Education or the defendant Commissioner of Education and therefore its application to the plaintiff to deprive him of both a property right and liberty to pursue an occupation of his own choosing violates both the substantive and procedural due process requirements of the Fourteenth Amendment to the Constitution of the United States.

29. That §3012 of the Education Law of the State of New York violates the Fourteenth Amendment to the Constitution of the United States because it is so overbroad that it unnecessarily infringes upon the plaintiff's fundamental right to engage in a common occupation of the community, and because it could be utlilized to chill the First Amendment rights to teachers subject to its jurisdiction since it provides no basis for plaintiff or any other teacher subject to its terms to be forewarned of what conduct is being proscribed or could subject them to dismissal proceedings in accord with its terms.

WHEREFORE, plaintiff Donald M. Kinsella respectfully prays that this court:

1. Assume jurisdiction in this matter;

2. Pursuant to Title 28 U.S.C. §2281 and §2284 convene a three-judge Federal District Court immediately to hear and determine this proceeding;

3. Issue a permanent injunction restraining defendants, their agents, employees, attorneys and others acting in concert therewith from the enforcement, operation or execution of §3012 and §3020-a of the Education Law of the State of New York;

4. That §3012 and §3020-a of the Education Law of the State of New York be construed and declared unconstitutional;

5. That pending the hearing and determination of prayers for permanent relief, a preliminary injunction issue restraining the defendants, their agents, servants, employees, attorneys and all others acting in concert therewith from enforcing or attempting to enforce in any way §3012 and §3020-a of the Education Law of the State of New York relied upon by the defendants in this action, or from instituting or undertaking any proceedings whatsoever pursuant to said statute against the individual plaintiff, or from preventing his employment as a teacher in Central School District No. 7 of the Towns of Amherst and Tonawanda;

6. Order defendant to make plaintiff whole for any loss of earnings suffered as a result of action taken by defendants; and

7. Allow plaintiff his costs and attorneys fees herein and grant any and all other relief which this court may seem fit in the premises.

Plaintiff respectfully prays that the above relief be granted.

Dated: April , 1973
Albany, New York

BERNARD F. ASHE
JAMES R. SANDNER
Attorneys for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

EXHIBIT A ANNEXED TO COMPLAINT
NOTICE OF DETERMINATION OF PROBABLE CAUSE

CENTRAL SCHOOL DISTRICT NO. 7
OF THE
TOWNS OF AMHERST AND TONAWANDA

NOTICE OF DETERMINATION OF PROBABLE CAUSE ON
CHARGES BROUGHT AGAINST TENURED SCHOOL DISTRICT EMPLOYEE
CHAPTER 717
LAWS of 1970

To: Donald M. Finsella

Please be advised that the Board of Education, of Central School District No. 7 of the Towns of Amherst and Tonawanda (Sweet Home Central School District) 1901 Sweet Home Road, Amherst, New York, meeting in executive session on March 5, 1973, has found that there is probable cause for the charges preferred against you by James M. Haught, which are enclosed herewith.

A copy of this charge is being forwarded to the New York State Commissioner of Education as required by law.

Enclosed are two copies of a summary of the rights of tenured employees under Chapter 717 of the Laws of 1970.

Within five days of receipt of these charges you must elect to request a hearing before a three member panel, or waive your right to such a hearing. Should you fail to so request or to waive within the specified five days, the school clerk will request the Commissioner to schedule a panel hearing in your behalf, as required by law. Three copies of forms which you may use to request a hearing, or waive a hearing are enclosed.

C. Leon Smith
District Clerk

( ) EXHIBIT "A"

Copy to:

Commissioner of Education
Division of Educational Management Services
State Education Department
Albany, New York 12224

EXHIBIT "A"

EXHIBIT B ANNEXED TO COMPLAINT
STATEMENT OF CHARGES AGAINST
DONALD M. KINSELLA

CENTRAL SCHOOL DISTRICT NO. 7

STATEMENT OF CHARGES AGAINST
DONALD M. KINSELLA

At an executive session of the Board of Education of Central School District No. 7 of the Towns of Amherst and Tonawanda, County of Erie, State of New York, held March 5, 1973 at the Sweet Home Senior High School, 1901 Sweet Home Road, Amherst, New York in said School District the following board members present:

Dr. M. Duane Mongerson
Dewey E. Ertell
Dr. Harold L. Kall
William P. O'Donnell
Kenneth J. Rebman
Clifford J. Waterhouse

The Board of Education considered charges preferred against Donald M. Kinsella by James M. Haught by letter dated March 1, 1973 and by unanimous vote determined that probable cause exists that:

1. on February 23, 1971, immediately following a basketball game which was a District sponsored athletic event and after a victory by the basketball team, students were taking down the nets from the basket rims in the gymnasium where the game was played. One of those students was Steven Ulmer, who was standing on the back and shoulders of another student, William Forbess. Mr. Kinsella grabbed Steven Ulmer by the hair and pulled him off the back and shoulders of the other student. Mr. Kinsella then struck or grabbed Steven Ulmer on the face two or more times causing him to bleed from the mouth and nose and also causing bruises on his face. Mr. Kinsella admitted he "roughed up" the student. Although the event occurred in the evening after the normal school hours, Mr. Kinsella was acting in an official capacity as chaperone, and was being paid by the district for such services.

2. on April 30, 1970 during normal school hours Mr. Kinsella while acting in his capacity as a teacher grabbed the hair of one Audrey Brooks, a student at the Senior High School with the result that she fell to the floor.

Exhibit "B"

3. on December 17, 1971, while teaching a regular gym class at the Senior High School, Mr. Kinsella pulled the hair of a student, Donald Gullo, slapped the student across the face, and threatened to "kick him in the balls."

4. the action referred to in paragraph one constituted the use of excessive physical force or excessive corporal punishment in violation of Policy and Rules 5131-1 adopted by the District on November 10, 1972, which Policy and Rules were communicated to Mr. Kinsella prior to such action. Accordingly, such action constituted "insubordination."

5. the incidents in paragraph one, two, and three were part of a pattern of conduct which indicates that Mr. Kinsella is not able to perform his duties as a teacher without the use of excessive physical force or excessive corporal punishment. That inability, together with the finding by the Board of Education and the finding of an impartial panel, empaneled pursuant to 3020(a) of the Education Law, that Mr. Kinsella on February 9, 1971 engaged in conduct unbecoming a teacher indicates that Mr. Kinsella is incompetent to serve as a teacher.

EXHIBIT "B"

EXHIBIT C ANNEXED TO COMPLAINT
REQUEST BY TENURED SCHOOL DISTRICT EMPLOYEE FOR A HEARING

Form 717-7

The University of the State of New York
The State Education Department
Division of Educational Management Services
Albany, New York 12224

Request by Tenured School District Employee
for Hearing before a Panel on Charges
Brought Against the Employee
Chapter 717
Laws of 1970

To: (Board of Education, Board of Cooperative Educational Services)
Central School District No. 7
Sweet Home Central School District
(legal title of district)
1901 Sweethome Rd.
Buffalo, N.Y. 14221
(address)

I, Donald M Kinsella, hereby request a panel hearing on charges
(name of tenured employee)
preferred against me, which charges were specified in your notice of determination of probable cause dated March 6, 1973.

March 7, 1973
(date request for hearing filed)

Donald M Kinsella
(signature of tenured employee)

Copy must be sent to:

Commissioner of Education
Division of Educational Management Services
State Education Department
Albany, New York 12224

EXHIBIT "C"

EXHIBIT D ANNEXED TO COMPLAINT
LETTER - GOODRICH TO KINSELLA
DATED MARCH 15, 1973

March 15, 1973

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Donald H. Kinsella
1265 Ellicott Creek Road
Tonawanda, New York 14150

Re: Sweet Home CSD 97 vs. Mr. Donald H. Kinsella

Dear Mr. Kinsella:

This is to notify you that the above tenured teacher hearing pursuant to Section 3020-a of the Education Law, has been scheduled for Tuesday, April 10, 1973 at 10:00 a.m. in the Holiday Inn, 1881 Niagara Falls Boulevard, Tonawanda, New York 14150.

The hearing officer is William P. Sellas, Esq., 17 Court Street, Buffalo, New York 14202, phone number - 716: 853-6130

Mr. Donald Thason is serving as the board panelist. He can be reached at Amherst Central Senior High School at 716: 835-3003, or at his residence at 716: 662-9073.

Very truly yours,

Watson I. Goodrich, Jr.
Associate in Educational
Employment Relations

WIG:jw
cc: James Gardner, Esq.

Exhibit "D"

EXHIBIT E ANNEXED TO COMPLAINT
PRINCIPAL PARTICIPATION LIST
DATE: APRIL 3, 1973

DOCKET
DIARY
FILE

The University of the State of New York
The State Education Department
Division of Educational Management Service
Albany, New York 12230

To: Those named below

Date: April 3, 1973

From: John A. DeSantis, 99 Washington Avenue 518:474-3334

Subject: Section 3020A Education Law - Teacher Tenure Hearing

Principal Participant List

NOTE: PLACE OF HEARING HAS BEEN CHANGED-SEE BELOW

School District Sweet Home CSD #7, 1901 Sweet Home Road, Buffalo, New York 14221

Clerk C. Leon Smith Address Above Phone: 716: 688-9673

Complainant Dr. James M. Haught, Principal Sr. High School Address Above 716: 688-6610
James L. David, Esq. 716: 836-3000
Represented by Gross, Sherman, Wilkie and Lieb, 1410 Liberty Bank Bldg., Buffalo, N.Y. 14202

Respondent-Tenured Teacher Donald H. Hansell, 1265 Ellicott Creek Road, Tonawanda, N.Y. 14150
James Saddner, Esq., Asst. General Counsel 518: 459-5400 X257
Represented by New York State United Teachers, 33 Elk Road, Albany, N.Y. 12203

Hearing Officer William P. Sellas, Esq., Sachacos & Sellas
17 Court St., Buffalo, N.Y. 14202 716: 853-6170

Court Reporter Elmer Cone Beyer 716: 856-2328
Court Reporters, 678 Ellicott Square Building, Buffalo, N.Y. 14203

Board Panel Member Donald W. Hanson, Amherst Central Sr. H.S. 716: 835-1220
4201 Mile Street, Amherst, N.Y. 14226 Res. Phone: 716: 571-6445
Donald Hon, Williamsville Office: 716: 633-7132

Employee Panel Member Dept. 68 East Eagle Street, Buffalo, N.Y. 14214 716:833-5044
Dr. Norman J. Dorsaw, West Seneca Schools 716: 652-1600

3rd Panel Member Dept. 16 Northern Drive, Orchard Park, N.Y. 14127 716: 662-4755

Date and Time of Hearing Tuesday, April 10, 1973 10:00 a.m.

Place of Hearing Charter Oak Recreation Room, 5 Bristol Drive (off Skinner Mills Rd.)
Williamsville, New York 14221

If above information is incomplete, additional notices will be forwarded as soon as information is available.

Copies sent to: All Persons Listed Above

EXHIBIT "E"

NOTICE OF MOTION FOR TEMPORARY RESTRAINING ORDER

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

CIV-1973-187

Civil Action No. _____

NOTICE OF MOTION

TO: Defendants

Board of Education Central School District
No. 7 of the Towns of Amherst and Tonawanda,
Erie County
1901 Sweet Home Road
Amherst, New York 14226

Ewald B. Nyquist
Commissioner of Education of the State of New York
State Education Building
Albany, New York 12224

PLEASE TAKE NOTICE that the undersigned will bring the annexed motion for a temporary restraining order and a preliminary injunction on for hearing before the United States District Court, U.S. Court House, City of Buffalo, on the 30th day of April, 1973, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, and that the motion requests the convening of a three-judge court to consider the application for preliminary injunction.

BERNARD F. ASHE
JAMES R. SANDNER
Attorneys for Plaintiff
Office and P.O. Address
50 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

Civil Action No. _____

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF TLE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

Defendants.

Upon the complaint and annexed affidavit, Donald M. Kinsella, the plaintiff, moves the court as follows:

1. To issue a temporary restraining order suspending and restraining the operation, execution or enforcement of §3012 and §3020-a of the Education Law of the State of New York pursuant to which the Board of Education of Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County and Ewald B. Nyquist, Commissioner of Education of the State of New York purport to be acting to determine the charges filed against Donald M. Kinsella, pending the hearing and determination upon the issuance of the preliminary injunction sought hereinafter in this motion.

2. To issue a preliminary injunction restraining the defendants, their agents, servants, employees, attorneys and all others acting in concert therewith from executing or attempting to execute in any way the provisions of §3012 and §3020-a of the Education Law of the State of New York, relied upon by the defendants in this action, or from instituting or undertaking any proceedings whatsoever pursuant to said statutes against the individual plaintiff or from preventing his employment as a teacher in the Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County pending the final hearing and determination of this cause.

The grounds of this motion, as more fully set forth in the complaint and annexed affidavit of Donald M. Kinsella are that:

a. The provisions of §3012 and §3020-a of the Education Law of the State of New York pursuant to which the Board of Education of Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County and Ewald B. Nyquist, Commissioner of Education of the State of New York purport to be acting to determine the charges against Donald M. Kinsella, violate the First and Fourteenth Amendments and are, therefore, unconstitutional.

b. The Board of Education of Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County and Ewald B. Nyquist, the Commissioner of Education of the State of New York, unless enjoined, threaten to invoke the provisions of §3012 and §3020-a of the Education Law of the State of New York to determine the charges filed against Donald M. Kinsella.

c. That the operation, execution or enforcement of these statutes will cause irreparable injury to the plaintiff.

d. Unless the operation and enforcement of these statutes is restrained pending final disposition of the action, the injury to plaintiff in the interim will be irreparable even by final judgment for plaintiff.

e. No injury will be sustained by the defendant or the public through issuance of a temporary injunction.

To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory court of three judges, at least one of whom shall be a circuit judge, in accordance with the provisions of §2284, Title 28, United States Code.

EDWARD A. ARIE
JAMES R. SANDNER
Attorneys for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

19.

AFFIDAVIT OF DONALD M. KINSELLA ANNEXED TO THE MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

Civil Action No. _____

AFFIDAVIT

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

STATE OF NEW YORK)
)ss.:
COUNTY OF ERIE)

DONALD M. KINSELLA, being duly sworn, deposes and says:

1. Deponent is the plaintiff herein and makes this affidavit in support of his motion for a temporary restraining order and preliminary injunction.

2. Deponent is presently a tenured teacher employed by the defendant Board of Education.

3. Dr. James M. Haught, the principal of the Senior High School of Sweet Home Central School District, by letter dated March 1, 1973, filed charges against the deponent with the defendant Board of Education.

4. Deponent was advised by notice dated March 6, 1973 that defendant Board of Education had found probable cause for the charges preferred by Dr. James M. Haught against the deponent. Said notice also advised the deponent that he must request or waive his right to a hearing on these charges before a three member panel within five days of the receipt of the charges or the "school clerk will request the Commissioner to schedule a panel hearing in your behalf as required by law."

5. Said notice was issued pursuant to Chapter 717 of the Laws of

1970 of the State of New York which amended §3012 and enacted §3020-a of the Education Law of the State of New York. Accordingly, the notice and actions of the defendant Board of Education are being taken pursuant to §3012 and §3020-a of the Education Law of the State of New York. Said statutes permit the suspension or termination of the deponent.

6. Deponent requested a hearing on March 7, 1973.

7. The defendant Commissioner of Education, by letter dated March 15, 1973, advised the deponent that he had scheduled a hearing pursuant to §3020-a of the Education Law of the State of New York. Accordingly the defendant Commissioner of Education is proceeding pursuant to §3020-a of the Education Law of the State of New York.

8. Deponent has filed a complaint contesting the constitutionality of the aforesaid statutes and now seeks a temporary restraining order and preliminary injunction restraining and enjoining the actions of the defendants Board of Education and Commissioner of Education pending the final determination of deponent's complaint so as to prevent immediate and irreparable injury to the deponent.

9. Suspension or termination of the deponent, or the conduct of proceedings pursuant to the aforesaid statutes will cause immediate and irreparable injury to the deponent in that it will stigmatize the deponent in a manner which no remedy at law can adequately erase.

10. The suspension or termination of the deponent's teaching status with the defendant Board of Education will cause immediate and irreparable injury to the deponent in that it will prevent the deponent from exercising his fundamental right inherent in the concept of liberty to pursue his chosen occupation and there is no adequate remedy at law for such a deprivation.

11. The suspension or termination of the deponent's teaching status

will cause immediate and irreparable injury to the deponent in that it will prevent him for teaching in Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County and, in all likelihood, in any other school district in this State or any other State and will, thereby deprive him of compensation that he would otherwise earn all without due process of law.

12. The hearing ordered by the Commissioner is now scheduled for May 2, 1973. To permit the hearing to proceed in the face of the constitutional challenge to the statute under which it has been ordered would cause immediate and irreparable injury to deponent in that deponent would suffer unnecessary financial, professional and emotional damage for which there is no adequate remedy at law.

13. Neither the defendants nor the public will be injured by the issuance of a tempoary restraining order and preliminary injunction as is evidenced by the fact that the defendant Board of Education has to date permitted the deponent to continue to teach without injurious consequences.

14. Deponent has read the complaint filed herein and states that the factual allegations contained therein are true and incorporated herein by reference.

Donald M. Kinsella

Donald M. Kinsella

SWORN to before me this

19th day of April, 1973.

Notary Public

GERALD [illegible]
[illegible] New York
[illegible] 74

NOTICE OF MOTION FOR ORDER DISMISSING THE COMPLAINT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff, CIV-1973-187

- against -

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

NOTICE OF MOTION

Defendants.

PLEASE TAKE NOTICE that on the 30th day of April, 1973, at 10:00 a.m. in the forenoon, the undersigned will move the United States District Court for the Western District of New York at a Special Term thereof to be held at the United States Court House, Buffalo, New York, for an Order dismissing the Complaint herein on the grounds that plaintiff is without standing to sue, that there is no justiciable case or controversy before the Court, that the Complaint fails to state a cause of action upon which relief may be granted, and that the allegations of the unconstitutionality of the State Statutes complained of are insubstantial and essentially ficticious.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Nyquist
Office & P. O. Address:
65 Court Street
Buffalo, New York 14202
Douglas S. Cream, of Counsel

TO: BERNARD F. ASHER
JAMES R. SANDNER
Attorneys for Plaintiff
80 Wolf Road
Albany, New York 12205

AFFIDAVIT IN OPPOSITION TO A MOTION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND CONVENING OF A THREE JUDGE COURT AND IN SUPPORT OF THE MOTION TO DISMISS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

CIV-1973-187

- against -

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

AFFIDAVIT IN OPPOSITION

Defendants.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

DOUGLAS S. CREAM, being duly sworn, deposes and says: the following:

FIRST: That he is an Assistant Attorney General of the State of New York, of counsel to LOUIS J. LEFKOWITZ, Attorney General, attorney for defendant EWALD B. NYQUIST, Commissioner of the New York State Department of Education.

SECOND: That this affidavit is made in opposition to plaintiff's Motion for a Temporary Restraining Order, Preliminary Injunction, and the convening of a three judge court.

THIRD: That this affidavit is further made in support of defendant Nyquist's Motion for dismissal of the complaint.

FOURTH: That plaintiff has failed to allege that defendant Nyquist has in fact applied the statutes sought to be declared unconstitutional against him in deprivation of any of plaintiff's Constitutional rights.

FIFTH: That plaintiff has failed to allege that defendant Board of Education has in fact applied the statutes sought to be declared unconstitutional against him in deprivation of any of plaintiff's Constitutional rights.

SIXTH: That plaintiff is not a member of the class against whom he alleges §3020-a of the Education Law unconsti-

tutionally discriminates.

SEVENTH: That plaintiff is not a member of the class which he alleges is unconstitutionally denied equal protection of the law by §3020-a of the Education Law.

EIGHTH: That by reason of the foregoing plaintiff has failed to demonstrate any injury to his legally protected interests.

NINTH: That by reason of the foregoing this Court is without jurisdiction to grant plaintiff's Motion on the grounds that there is no justiciable case or controversy before it.

TENTH: That by reason of the foregoing this Court is without jurisdiction to grant plaintiff's Motion on the grounds that plaintiff is without standing to sue.

ELEVENTH: That this Court is without jurisdiction to grant plaintiff's Motion on the grounds that his allegations of unconstitutionality of the State Statutes are insubstantial and essentially ficticious.

TWELFTH: That by reason of the foregoing the Complaint fails to allege a cause of action upon which relief may be granted.

THIRTEENTH: That plaintiff's allegation that he will suffer irrepairable injury should the Court deny his Motion presumes a chain of occurances which may or may not occur at some time in the future and his claim is therefore academic.

FOURTEENTH: That plaintiff has failed to allege a probability of success on the merits of his action.

FIFTEENTH: That there is in fact no probability that plaintiff will prevail on the merits of his action.

SIXTEENTH: That by telephone conversation had April 27, 1973, James R. Sander, attorney for plaintiff, has waived the

5 day Notice of Motion required by the Federal Rules of Civil Procedure for the bringing on of defendants within Motion to Dismiss.

WHEREFORE, your deponent respectfully requests that this Court enter an order denying plaintiff's Motion in all respects and dismiss the Complaint.

/s/ Douglas S. Cream

Subscribed and sworn to before me
this 27th day of April, 1973.

/s/ Kathleen M. Jackson
Commissioner of Deeds, Buffalo, N.Y.
Commission expires December 31, 1974.

ANSWERING AFFIDAVIT OF THOMAS L. DAVID, ESQ., SWORN TO APRIL 30, 1973

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTIRCT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF STATE OF NEW YORK,

CIVIL ACTION NO. 1973-187

ANSWERING AFFIDAVIT

Defendants.

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

THOMAS L. DAVID, being duly sworn, deposes and says:

1. Deponent is the attorney for the defendant School Board and has acted in the capacity of general counsel to the defendant Board for approximately two and one-half years.

2. Deponent acted as counsel for the defendant School Board on the previous proceeding under Section 3020-a of the Education Law of the State of New York against plaintiff, and in that proceeding objection was made to the alleged dual roll of your deponent as "prosecutor" and also adviser to the Board of Education in its deliberations leading to the determination of the charges against plaintiff. Such earlier proceeding related to an incident which occurred in February, 1971.

3. In the earlier proceeding referred to in number 2, your deponent refrained from engaging in the Board of Education's deliberations in connection with such earlier proceeding since your deponent did not wish to influence the defendant School Board. The deponent served only in the capacity of a technical adviser and did not attend or take part in the said deliberations.

4. The deponent does not intend to take part in the deliberations which will be required by the present proceeding against the plaintiff under Section 3020-a. The deponent's posture in those deliberations will be of a technical nature advising the defendant School Board only of the procedures which must follow. Deponent will submit such technical advice to the defendant Board in writing.

Thomas L. David

Sworn to before me
this 30th day of ~~May~~ April, 1973.

Notary Public

[illegible] New York
[illegible] March 30, 1975

TEMPORARY RESTRAINING ORDER ENJOINING THE HOLDING OF A HEARING

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA

Plaintiff

-against-

Civil Action No.
CIV-1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK

ORDER

Defendants

This Cause came on to be heard on April 30, 1973 on Plaintiff's motion for a temporary restraining order, preliminary injunction and the convening of a three-judge court to consider the application for the preliminary injunction and upon the Complaint and the Affidavit of DONALD M. KINSELLA, dated April 19, 1973, and the court having decided to take the matter under advisement and to defer its ruling thereon; and it appearing to the court from the Complaint and the affidavit of DONALD M. KINSELLA, dated April 19, 1973, that Plaintiff has raised serious questions as to the fairness of an Administrative Hearing sought to be held by Defendants on May 2, 1973, and that immediate and irreparable injury, loss or damage will result to Plaintiff, in that Defendants, their agents and employees will conduct on May 2, 1973, and to completion, a hearing pursuant to Section 3020-a of the Education Law of the State of New York, before there has been proper opportunity for a judicial determination of the merits of Plaintiff's motion and application, thereby rendering meaningless Plaintiff's right to be heard;

ADELMAN & RENALDO
ATTORNEYS AT LAW

IT IS HEREBY ORDERED that Defendants, their agents and employees, be enjoined from holding the hearing scheduled for May 2, 1973, and from in any way changing or adversely affecting Plaintiff's employment with Defendant BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWN OF AMHERST, AND TONAWANDA, ERIE COUNTY, until May 23, 1973 at 10:00 A.M. or until such time as there has been a judicial determination of Plaintiff's motion and application.

/s/ John O. Henderson

Hon. John O. Henderson

United States District
Judge for the Western
District of New York

FUDEMAN & RENALDO

AFFIDAVIT OF M. DUANE MONGERSON
SWORN TO MAY 25, 1973

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA

Plaintiff,

-against-

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

Civil Action No. 1973-187

AFFIDAVIT IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATE OF NEW YORK,
) SS:
COUNTY OF ERIE)

M. DUANE MONGERSON, being duly sworn, deposes and says:

1. Your Deponent is the President of the BOARD OF EDUCATION OF THE CENTRAL SCHOOL DISTRICT NO. 7 of the Towns of Amherst and Tonawanda, and makes this Affidavit in opposition to Plaintiff's motion for a Temporary Restraining Order and Preliminary Injunction.

2. The granting of a Temporary Restraining Order at this time would cause irreparable injury to the Defendant, BOARD OF EDUCATION, in as much as a hearing under Sec. 3020-a of the Education Law of the State of New York is scheduled to commence on May 2, 1973. Three (3) panel members have been selected, one by the Plaintiff, one by the Defendant and the third by the two previously selected members. These panel members have arranged their schedules to be available for this hearing and if there is a postponement of this hearing, the changing of schedules and the possibility of selecting new panel members would cause additional delay and inconvenience.

3. A hearing officer has been selected to serve at this hearing on May 2, 1973, and has arranged his schedule so as to be available on that date. In addition, a postponement would cause the cancellation of the scheduled testimony of certain students who are to appear as witnesses. If a hearing were postponed until June, 1973, the academic status of these students would be jeopardized as their examinations would then be in progress. Two of the students who are scheduled to testify are seniors in high school and will not be attending classes in the school district after June and may not be readily available for a hearing after June of this year. Finally, the Plaintiff has already been granted one postponement of this hearing which was originally scheduled for April 10, 1973.

4. If the charges against the Plaintiff are proved to be true, and if it is found that he has engaged in a course of conduct which included the use of excessive physical punishment, your Deponent believes that the Defendant, BOARD OF EDUCATION, will be obligated to take steps to protect its students from any further improper acts by the Plaintiff. The BOARD OF EDUCATION did not suspend the Plaintiff pending this hearing in part because of the punitive aspect of such a suspension. In reaching the decision to allow Plaintiff to continue as a teacher, the BOARD OF EDUCATION took into account the fact that a hearing would be scheduled and completed within the time table provided by Sec. 3020-a and that the matter accordingly would be resolved within a few weeks. Further, your Deponent believes that the BOARD OF EDUCATION could not reach that same judgement decision if the charges against Plaintiff were not to be resolved for a number of months or perhaps a year, as may occur, if the action by the Plaintiff herein results in extended litigation.

5. By denying Plaintiff's motion for Temporary Restraining Order, no irreparable injury will be caused to the Plaintiff since the hearing will proceed pursuant to Sec. 3020-a with all of the protections provided therein. Said hearing should take no longer than two days during which time Plaintiff will not be suspended and he will be continued in his status as an employee of the BOARD OF EDUCATION. In addition, this hearing will be conducted in complete privacy and closed to all unless Plaintiff elects otherwise. Thereafter, the Plaintiff will have an adequate opportunity to seek judicial action if the Defendant, BOARD OF EDUCATION, acts in a way which the Plaintiff feels will deprive him of his constitutional rights. To date, there has been no suspension and no deprivation of Plaintiff's constitutional rights. Plaintiff's motion for Temporary Restraining Order and Preliminary Injunction is anticipatory and premature at this time.

WHEREFORE, your Deponent respectfully requests this court to deny the motion for Temporary Restraining Order and Preliminary Injunction on the grounds that no harm, injury or damage will occur to Plaintiff if said hearing is conducted and the proceeding under Section 3020-a of the New York Education Law is allowed to continue as scheduled, whereas, substantial injury will occur to the Defendant, BOARD OF EDUCATION, if this hearing and proceeding is stayed and/or delayed.

M. Duane Mongerson, President

Sworn to before me
this 23rd day of May, 1973.

Notary Public

SUE ANN [illegible] New York
[illegible] 30, 19 74

ORDER REQUESTING THE CONVENING OF A THREE JUDGE COURT AND GRANTING A PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff

-vs- CIVIL 1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY, and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants

APPEARANCES: BERNARD F. ASHE, ESQ., JAMES R. SANDNER, ESQ., Albany, New York, for Plaintiff.

THOMAS L. DAVID, ESQ., Buffalo, New York, for Defendant Central School District No. 7.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (DOUGLAS S. CREAM, ESQ., of Counsel), for Defendant Nyquist.

The plaintiff has filed this action under 42 U.S.C. § 1983, alleging the unconstitutionality of sections 3012 and 3020-a of the Education Law of the

State of New York. The plaintiff has moved for a temporary restraining order and preliminary injunction, and for the convening of a statutory court of three judges in accordance with the provisions of section 2284, Title 28, United States Code, to hear and determine its prayer for a permanent injunction against enforcement of the statutes in question and a declaratory judgment of their unconstitutionality. The Attorney General of the State of New York has moved to dismiss the complaint on grounds that plaintiff is without standing to sue; that there is no issue or controversy before the court; that the complaint fails to state a cause of action upon which relief can be granted; and that the allegations of unconstitutionality of the statutes in question are insubstantial and essentially fictitious.

On April 30, 1973 this court heard argument on the motions and issued a temporary restraining order enjoining further proceedings by the defendants, pending the determination of the remaining motions. That

temporary restraining order has been extended by consent of the parties to the present date.

The plaintiff is a tenured teacher who has been employed by the defendant, Board of Education of Central School District No. 7, as a physical education and health education instructor for fourteen years. On March 1, 1973 the principal of the Senior High School of Sweet Home Central School District, where plaintiff is employed, filed charges against plaintiff with defendant Board of Education pursuant to provisions of section 3020-a-1 of the Education Law of the State of New York. The Board, acting pursuant to the same statute, made a finding that probable cause existed that on three separate occasions the plaintiff administered excessive corporal punishment to students in violation of an express policy and rule of the school district. Plaintiff was notified in writing of the charges and of his right to a hearing before a three-member panel. Plaintiff requested that a hearing be held, but prior thereto he filed this action and the temporary restraining order issued.

Section 3012 of the Education Law provides that a tenured teacher shall hold his position

> "during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty . . ."

Plaintiff contends that the foregoing statute is unconstitutionally vague in that it fails to set forth guidelines for its application, either in other statutes or in the rules or regulations of either defendant.

Section 3020-a of the Education Law was adopted in 1970 to provide the administrative machinery for processing charges against a tenured teacher. It provides that charges against a tenured teacher are to be filed in writing with the clerk of the school district. Upon receipt, the clerk is to notify the Board of Education, and, within five days thereafter, the employing board, in executive session, determines by majority vote whether

probable cause exists. If that determination is affirmative, a written statement of charges is sent to the teacher. The teacher can then elect to have a hearing on those charges. If a hearing is requested, the Commissioner of Education schedules a date for the hearing. The Commissioner maintains a list of hearing panel members selected from lists submitted by organizations representing teachers, supervisors and employing boards. From the list, the teacher selects one member, the employing board selects another, and together they select a third. At the hearing, a hearing officer selected by the Commissioner presides. The technical rules of evidence do not apply at the hearing. The teacher has the right to testify in his own behalf at the hearing, to be represented by counsel, and to subpoena and cross-examine witnesses. A record of proceedings is kept, transcribed and furnished to the teacher without charge. Following the hearing, the Commissioner forwards to the employing board a hearing report that includes the findings and recommendations of the hearing panel, including any recommendation as to penalty. The statute

then recites that within thirty days of receipt of the hearing report the employing board "shall determine the case by a vote of a majority of all members of such board and fix a penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal." The latter provision has been interpreted to mean that the findings and recommendations of the hearing panel are merely advisory, and not in any way conclusive upon the employing board. LeTarte v. Board of Education, 65 Misc. 2d 147, 316 N.Y.S.2d 781 (1970).

The plaintiff contends that the administrative procedure outlined above is unconstitutional in that (1) a teacher may be suspended from his duties prior to any hearing; (2) the statute discriminates against nontenured teachers by not affording them the right to a hearing; (3) the statutory process could be used to chill the First Amendment rights of teachers; (4) the plaintiff will be denied a meaningful hearing of his case because he will not be permitted to present favorable evidence or to rebut adverse evidence before the

body that has the power to determine the charges, that is, the Board of Education; (5) the same attorney who represents the Board of Education at the probable cause hearing will prosecute the case before the hearing panel in his capacity as attorney for the school principal who brought the charges, and will continue to act as attorney for the Board of Education, and presumably render advice to that board at the time the case is determined; (6) the same body that made the finding that there was probable cause to support the charge preferred against him will ultimately determine his guilt as to that charge and decide upon a penalty.

Upon application for a three-judge court, the district judge before whom application is made must determine whether the constitutional question raised is substantial, whether the complaint, at least formally, alleges a basis for equitable relief, and whether the case otherwise comes within the requirements of the three-judge statute. See Idlewild Liquor Corp. v. Epstein, 370 U.S. 713 (1962); Nieves v. Oswald, Nos. 72-1974, 722322 (2d Cir. Apr. 20, 1973), slip op. at 2977.

The defendants contend that all three requirements for convening a three-judge court are lacking. This court is satisfied, however, that the plaintiff has alleged a basis for equitable relief and that this court has subject matter jurisdiction under 42 U.S.C. 1983 and 28 U.S.C. 2281.

With regard to the question of whether a substantial constitutional question has been alleged, this court notes the language of Goosby v. Osser, ___ U.S. ___ (1973), 41 U.S.L.W. 4167:

> "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' Bailey v. Patterson, 369 U.S. 31, 33, 7 L Ed 2d 512, 82 S Ct 549 (1962), 'wholly insubstantial,' ibid., 'obviously frivolous,' Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288, 54 L Ed 482, 30 S Ct 326 (1910), 'obviously without merit,' Ex parte Poresky, 290 U.S. 30, 32, 78 L Ed 152, 54 S Ct 3 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the

> purpose of 28 USC §2281 [28 USCS §2281]. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'"

Applying that standard, the complaint of the plaintiff does raise a substantial federal question. While this court expresses no opinion on the merits of the issues raised by the plaintiff, the contentions that section 3012 is unconstitutionally vague, and that the Board of Education may make its determination of the case without regard to the findings and recommendations of the hearing panel, and with the advice of the "prosecuting" attorney, are of particular concern.

Accordingly, The Honorable Chief Judge of the United States Court of Appeals for the Second Circuit is hereby requested to convene a three-judge court to hear and determine this cause.

The plaintiff has raised questions of a serious, substantial and difficult nature which require more deliberate investigation. Moreover, unless they are

restrained from doing so, the defendants may proceed with the hearing on the pending charges previously scheduled. The administrative inconvenience that may be suffered by the defendant school board by a preliminary injunction is far outweighed by the potential harm to the plaintiff if he is forced to engage in an administrative proceeding ultimately found to be unconstitutional. Therefore, pending the convening of a three-judge court, the defendants are enjoined from any further proceedings under sections 3012 and 3020-a of the Education Law of the State of New York against this plaintiff.

It is so ordered.

/s/ John O. Henderson

JOHN O. HENDERSON
United States District Judge

DATED: June 19th, 1973.

ANSWER OF DEFENDANT BOARD OF EDUCATION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO.7 OF THE TOWNS OF AMHERST AND TONAWANDA, and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

ANSWER

Civil Action
No. 1973-187

The defendant, Board of Education of Central School District No.7 of the Towns of Amherst and Tonawanda, through its attorneys, Ohlin, Damon, Morey, Sawyer & Moot, for its answer to the matters set forth in the complaint:

First: Admits the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 27 of the complaint.

Second: Denies each and every other remaining allegation of the complaint not hereinbefore specifically admitted or denied.

WHEREFORE, the defendant Board of Education of Central School District No.7 of the Towns of Amherst and Tonawanda demands judgment dismissing the complaint herein as to it together with the costs and disbursements of this action.

Dated: May 7, 1973

OHLIN,DAMON,MOREY,SAWYER & MOOT,

BY _____

James C. McAskill
(A member of the firm)
Attorneys for Defendant Central
School District No.7
1800 Liberty Bank Building,
Buffalo, New York 14202

ANSWER OF DEFENDANT NYQUIST

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

- against -

CIV-1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

ANSWER

Defendants.

Defendant Ewald B. Nyquist, Commissioner of Education of the State of New York, by his attorney Louis J. Lefkowitz, Attorney General of the State of New York, Douglas S. Cream, Assistant Attorney General, of Counsel, as and for his Answer in the above-entitled matter sets forth as follows:

FIRST: ADMITS each and every allegation contained in paragraphs numbered "1", "2", "3", "6", "7", "8", "9", "10", "11", "12", "13", "15", "16" and "27" of the Complaint.

SECOND: DENIES information sufficient to form a belief as to the truth of those allegations contained in paragraphs numbered "4" and "5" of the Complaint.

THIRD: DENIES each and every allegation contained in paragraphs numbered "14", "17", "18", "19", "20", "21", "22", "23", "24", "26", "28" and "29" of the Complaint.

FOURTH: DENIES each and every allegation of the Complaint not heretofore admitted, denied or controverted.

AS AND FOR FURTHER ALTERNATIVE DEFENSES DEFENDANT NYQUIST SETS FORTH AS FOLLOWS:

FIFTH: That the Complaint fails to state a claim against defendant upon which relief may be granted.

SIXTH: That plaintiff is without standing to sue as to

all causes of action alleged in the Complaint.

SEVENTH: That plaintiff is without standing to sue as to those causes of action alleged by paragraphs "20", "25", "26" and "29" of the Complaint.

WHEREFORE, defendant Ewald B. Nyquist, as Commissioner of the New York State Department of Education, respectfully requests that this Court dismiss the Complaint in all respects.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Nyquist
(Douglas S. Cream, of Counsel)
Office & P. O. Address:
65 Court Street
Buffalo, New York 14202

AFFIDAVIT OF M. DUANE MONGERSON
SWORN TO SEPTEMBER 13, 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KENSELLA,

Plaintiff,

-against-

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY, AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF STATE OF NEW YORK,

Defendants.

CIVIL ACTION NO. 1973-

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

M. DUANE MONGERSON, being duly sworn, deposes and says:

1. He is President of the Board of Education of the Central School District No. 1 of the Towns of Amherst and Tonawanda, and makes this Affidavit in connection with the above action.

2. Deponent's attention has been called to Plaintiff's Memorandum of Law in connection with the within action and specifically to certain references made to policies and rules of the Defendant School District at pages 2 and 21 of such Memorandum.

3. Attached hereto are copies of the policies and rules of the School District which Plaintiff purports to attack as adopted on April 2, 1973 and June 4, 1973. Each year, a copy of such policies and rules is distributed to all District teachers. The Teacher's Handbook contains specific cited reference to such policy and rules. Actual copies of such policies and rules were also contained in the notice

for the 1972-1973 school year. A copy of such policies and rules will be maintained in the library of each school building in the District, available for inspection by all students and District employees.

M. Duane Morgenson

M. DUANE MORGENSON, PRESIDENT

Sworn to before me this

13th day of September, 1973

Sue Ann Dier

Notary Public

SUE ANN DIER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1974

EXHIBIT ANNEXED TO AFFIDAVIT OF MONGERSON (SEPTEMBER 13, 1973) POLICY ON CORPORAL PUNISHMENT DATED APRIL 26, 1961

CORPORAL PUNISHMENT

The use of corporal punishment as a means of discipline is not to be encouraged; however when necessary must be reasonable in manner and moderate in degree.

Policy Adopted: April 26, 1961

EXHIBIT ANNEXED TO AFFIDAVIT OF MONGERSON (SEPTEMBER 13, 1973) RULES ON CORPORAL PUNISHMENT DATED MAY 11, 1961

Rules - 5131-1

CORPORAL PUNISHMENT

1. If a teacher finds it necessary to administer physical punishment, the teacher should notify the principal in writing, explaining the action taken and circumstances which required such action.

2. Teachers are discouraged from administering physical punishment during class or in the presence of other classmates except under emergency conditions.

Effective: May 11, 1961

EXHIBIT ANNEXED TO AFFIDAVIT OF MONGERSON (SEPTEMBER 13, 1973) POLICY ON CORPORAL PUNISHMENT DATED NOVEMBER 16, 1972

Policy 5131-1

CORPORAL PUNISHMENT

The use of physical penalty as a means of correcting a wrong-doing by a student is strongly discouraged; however, when necessary it must be reasonable in manner and moderate in degree.

All employees of the district shall share responsibility for supervising the behavior of students and for seeing that they meet the standards of conduct which have been or may hereafter be established by the Board or its agent.

NOTE: The board of education will not in any way condone student behavior which is dangerous, disruptive or which interferes with the learning experiences of others. At the same time, the members of the board of education would like it understood that they strongly discourage the use of a physical penalty as a means of solving these or other disciplinary type problems. They feel, in almost all instances, that the physical penalty used is not related to the actual cause for the situation and indeed may initiate new and/or additional problems. The board favors instead, the application of all the nonphysical type of psychological, sociological and/or human relations skills available to staff members as a result of personnel educational background or through the assistance of fellow workers. This type of attitude will best lend itself to the maintenance of a positive and high quality educational program in Sweet Home.

Reference: Penal Law 35:10
See Hageney's Handbood - 1970 Revision - 6:10, P. 48

Date Revised November 16, 1972

EXHIBIT ANNEXED TO AFFIDAVIT OF MONGERSON
(SEPTEMBER 13, 1973) RULES ON CORPORAL
PUNISHMENT DATED NOVEMBER 16, 1972

CORPORAL PUNISHMENT

1. If a staff member finds it necessary to administer a physical penalty he/she should notify their supervisor immediately and submit a written report of the incident prior to leaving the building at the close of the school day. The report should explain the action taken and circumstances which required such action.

2. Staff members are discouraged from administering a physical penalty in the presence of other classmates except under emergency conditions.

3. The supervisor should use his/her discretion regarding the necessity of written statements and interviews from and with all individuals involved (e.g., participants, observers) in a situation which a physical penalty has been used.

Date Revised November 16, 1972

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-vs- Civil 1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY, and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

Proceedings held in the above entitled action before the HON. JAMES L. OAKES, the HON. JOHN O. HENDERSON and the HON. JOHN T. CURTIN, on September 14, 1973, at the United States Courthouse, Buffalo, New York.

APPEARANCES:

BERNARD F. ASHE, ESQ.,
JAMES R. SANDNER, ESQ., and
IVOR R. MOSKOWITZ, ESQ.,
Appearing on behalf of the Plaintiff.

JAMES S. McASKILL, ESQ.,
Appearing on behalf of the defendant
Board of Education.

DOUGLAS S. CREAM, ESQ.,
Assistant Attorney General,
Appearing on behalf of the defendant
Ewald B. Nyquist.

****

H. T. NOEL
OFFICIAL REPORTER, U.S. DISTRICT COURT

JUDGE OAKES: Counsel for Kinsella against the Board of Education present?

MR. SANDNER: Present, your Honor, for plaintiff Kinsella.

JUDGE HENDERSON: Will you give your names to the reporter, as you introduce yourselves?

MR. SANDNER: James R. Sandner, co-counsel for plaintiff Kinsella.

MR. ASHE: Bernard F. Ashe, co-counsel for plaintiff Kinsella.

MR. MOSKOWITZ: Ivor Moskowitz, co-counsel for plaintiff Kinsella.

MR. CREAM: Douglas S. Cream, Assistant Attorney General, for Commissioner Ewald B. Nyquist.

MR. McASKILL: James McAskill, of counsel for Thomas David, who is counsel for the Sweet Home Central School Board.

JUDGE OAKES: I will ask counsel for the plaintiff, how much time do you think you want in direct?

MR. SANDNER: Presentation of our case in chief and argument, your Honor, I think twenty to thirty minutes.

JUDGE OAKES: All right. Would you like to reserve a little time for rebuttal?

MR. SANDNER: Yes, I would, your Honor. I will

reserve five minutes of that time for rebuttal.

JUDGE OAKES: Very well, we will give you the thirty. If it looks as though we need more, we will take it. And for the School Board?

MR. McASKILL: I would say ten minutes would be sufficient, your Honor.

JUDGE OAKES: For the State?

MR. CREAM: Ten to fifteen minutes, your Honor.

JUDGE OAKES: Very well, you may proceed.

MR. SANDNER: May it please the Court: The operative facts which led to this proceeding now before the Court on our motion for a preliminary injunction and a permanent injunction started with plaintiff Kinsella, who is a teacher in the Sweethome School District, and has been for a period of approximately fourteen years.

On March 1, 1973 the principal of the high school and the defendant School District preferred charges against plaintiff Kinsella, and on March 5th the defendant Board of Education found probable cause sufficient to issue a notice to the

Commissioner of Education and the Department of Education, to require the convening of a panel hearing, a three member panel hearing, under Section 3020(a) of the Education Law.

The notices were sent out regarding the hearing, and plaintiff Kinsella, in accordance with the rule that was then in effect, asked for a hearing within five days of this notice of probable cause. Notices were sent out to the parties, indicating that the hearing had been scheduled, and indicating the representation of the parties, which included Thomas David, the attorney for the Board of Education, as representing the complainant principal.

Thereafter, after requested adjournments, we filed this action seeking a restraint on the hearing and convening of this three judge panel. Chief Judge Henderson heard argument on that issue in April, and rendered a decision thereafter, restraining the proceedings and finding

substantial federal constitutional questions presented by the pleadings and that we had standing, and asked the Second Circuit for a convening of this panel, which was so ordered by the chief judge.

JUDGE OAKES: Is the posture of this case -- and I couldn't quite figure it out from the record -- that we are here today only in respect to whether or not a preliminary injunction should be continued or are you, at least for the plaintiff, prepared for us to make a decision on the merits altogether?

MR. SANDNER: I think the decision would decide both points. We are here asking for the preliminary and permanent injunction. I would call to the Court's attention the fact that the convening of this panel today vacates the stay which has been in being since Judge Henderson's order earlier in the year. We would ask the Court, when it takes the case under advisement, to continue the stay of proceedings until such time as it

considers the matter and disposes of it. The posture of the case, however, is that both the State and the School District have filed answers with respect to the complaint, having already made motions before Chief Judge Henderson with respect to a dismissal for failure to state a cause of action.

In question for consideration are two statutes of the State of New York. First is Section 3012 of the Education Law, which applies to union free school districts, and in our papers we have mentioned some approximately two hundred and forty such districts exist in the state. There are other provisions of the Education Law which have identical language to the language of 3012, in question here, which apply to other kinds of school districts, and indeed beyond that there are school districts that have an entirely different kind of statute, talking only about cause.

Section 3012 is the statute under which employees are appointed and

determined to be granted tenure and continued employment, subject to the provisions that we are now challenging in this action.

The other statute which is under consideration, referred to in Section 3012, is Section 3020(a) of the Education Law. Essentially, 3020(a) is a procedural statute. As I said, 3012 has a reference to it. When someone is charged with conduct deemed to be proscribed in 3012, and indeed all of the other statutes which I have mentioned to you, the charge or charges are tried and processed under the procedural aspects of 3020(a).

With respect to 3020(a), we have challenged the statute on three grounds. The question first is one of overbreadth --

JUDGE OAKES: 3020(a) or 3012?

MR. SANDNER: 3012, yes, your Honor. We attack as to overbreadth, as to vagueness, and indeed to an equal protection of sufficiency in that statute. First of all --

H. T. NOEL
OFFICIAL REPORTER U.S. DISTRICT COURT

JUDGE OAKES: You can almost put the last one aside, can't you? Is that your argument, that non-tenured teachers do not have the protection of tenured teachers?

MR. SANDNER: That is in part a corner of that argument, your Honor. However, the remainder of the argument relates to what I said is factual matter. That we have in the State of New York something like seven hundred and fifty school districts, and at least two hundred and forty of them are districts which are covered by Section 3012, and therefore plaintiff Kinsella in the Sweet Home School District, as contrasted with some other teaching employee in other school districts, may not have the same law applied to him. Presumably, on its face, the statute says the same, as it is applied to those districts, and yet in the interpretation, the application of the words of the statute to Kinsella or any other teacher in the other school districts, there can be a denial of equal protection of the law. For

example, the regulation which is urged upon the Court to support the charge in this case could be totally different, totally absent in other school systems, which has to apply the same words of the statute to a situation that comes up in that school system. In other words, if the identical policy of the Board of Education were found to be in some other school system, it may be in that school system that a charge of this kind would never arise, and indeed our position would be it should have never arisen, in the first place, under that regulation and indeed under the laws of the State of New York. But the equal protection argument goes beyond the question of distinction between tenured and non-tenured employees.

JUDGE OAKES: You can continue with your argument.

MR. SANDNER: The first attack is to the over-breadth of the statute, and we have forwarded to the Court, in accordance with its request, our response to the impact of the Broderick case, origin-

ally decided by the Supreme Court in this matter, and to put it in a nutshell, our contention on this matter is simply that in this case it could be applied, the Broderick case would not preclude the application of an overbreadth concept to the statute.

JUDGE OAKES: Why? That case, as I read it at least, says if there is hard core conduct that is proscribed by the statute in question, that the plaintiff who has engaged in that hard core conduct has no standing to claim overbreadth. My question is why isn't in effect the alleged use here of physical violence on students the very kind of hard core conduct that has been proscribed not just by the rule of the local board, but by New York State law for many years?

MR. SANDNER: Well, the statute in question, as it relates only to this case, specifies insubordination and incompetence, and indeed conduct unbecoming a teacher, and those are the only words in the statute that are recited by the Board of Education in its charges.

It does not recite the statute, such as the one in the Broderick case where the detail of Subdivision 6 and 7 are referred to in that action, exactly what matters are to be considered, proscribed by the statute. It may be -- again coming back almost to an equal protection argument -- it may be that it could be deemed insubordination in one school district and not in another, it may be deemed incompetence in one school district and not in another, but the regulation of the school districts, first of all, permits corporal punishment. It in no way gives any indication on its face as to any restriction in its application. The penal law of the State of New York also, in the section on justification as a defense, allows a teacher to use the force that he reasonably believes necessary to control the situation, and indeed it may be that the regulation of the school board is not consistent with the statute, as I have just described it to you.

Our position, your Honor, is that the statute, 3012, and the standards upon which charges may be presented, does not in fact describe conduct in detail and to the extent that you can reach the conclusion as reached in Broderick perhaps, and as asserted by the State in its letter memorandum, that indeed falls within the hard core conduct that is proscribed. There is no other definition in 3012, there is no other definition in 3020(a), there is no definition in any of the regulations of the State of New York Department of Education. There at best is a maze of legal decisions rendered by the state courts from time to time, interpreting different aspects of this question, interpreting the provisions of the prior penal law which had a different test, which was administering corporal punishment in a manner that was reasonable in manner and moderate in degree, and presumably has been changed by the new penal law. There are no standards whatsoever. Indeed, the State and

defendant School Board assert no standards in their memorandum, show to this Court no regulation, indeed not even point out there are cases in the State of New York which talk about this conduct. So there is no way that you can interpret the word "insubordination" for example, to know that if you use a certain amount of force that you will be in prohibited activity. Indeed, the regulations of the School Board is deficient in that regard also. It talks about it in a general sense --

JUDGE OAKES: Use of excessive force.

MR. SANDNER: But that term itself is not self defining.

JUDGE OAKES: What do you want for a definition? Do you have to have the number of punches in the nose spelled out? How could you possibly ever get into a specific definition of what constitutes the use of excessive force?

MR. SANDNER: Well, I believe the correct definition on the limitation would be the one set forth in the penal law, and that is the force that the individual

teacher reasonably believes necessary to control the situation. Indeed it is a subjective test and --

JUDGE OAKES: It says "reasonably believes", if it is as you say it. Isn't that just as vague as use of unreasonable force?

MR. SANDNER: Well, I think that particular definition would have more meaning to a person that would be under the aegis of the statute and trying to determine for himself what regulation he should follow. As I say, there are no other definitive guidelines or regulations regarding this statute. The statute also, we contend, on the basis of the James and Russo cases, decided by the Second Circuit, those cases, although they dealt with probationary teachers, arguably the conduct proscribed in those cases related to or could be considered insubordination.

JUDGE CURTIN: Well, you have no First Amendment claim in this case at all, do you?

MR. SANDNER: Yes. That is what I am suggesting to your Honor now, the James and the Russo cases illustrates the overreach of the statute.

JUDGE CURTIN: In this case, you don't have any First Amendment claim in this case, do you?

MR. SANDNER: Yes -- not --

JUDGE CURTIN: In the Kinsella case?

MR. SANDNER: The charges do not relate to any expressive conduct on his behalf and do not relate to any utterances of the plaintiff, but we are saying that the Broderick case, with the interpretation put on it by the Russo and James cases, relating to the insubordination, clearly show that the statute is sweeping and can be utilized to catch in its breadth activities which are clearly protected under the First Amendment, and therefore we say that under Broderick we do have standing to make that assertion.

The real core of our argument with respect to 3012 is in regard to the vagueness of the statute, and that is a different test. In Broderick, as we note in our letter of memorandum, the court found at the outset that the statute was not vague.

JUDGE HENDERSON: Let me ask you, you talk about conduct unbecoming a teacher, and I am not, of course, in any position to judge the truth of these allegations, but I have been reading once again some of the claims of what the teacher did, and there was this February 23, 1971 incident when he allegedly grabbed a fellow named Steven, struck him on the face two or three times, causing him to bleed from the mouth and nose, and causing bruises on his face. On Apri 30, 1970 he was alleged to have grabbed a girl by the hair with such violence that she fell to the floor. Then on December 17, 1971, while teaching a regular gym class at the Senior High School, Mr. Kinsella pulled the hair of a student, Donald Gullo, slapped the student across the face, and threatened to kick him in the balls. Now, do you mean there is something vague about that, if it is true, as constituting behavior contrary to the standards of a teacher?

MR. SANDNER: No, your Honor.

JUDGE HENDERSON: If it is true. I am not prejudging the truth of it.

MR. SANDNER: I'm not saying that the charges are necessarily vague, not that the charges of the School District are vague. I'm saying the statute under which we are being charged --

JUDGE HENDERSON: If that were true, is that conduct unbecoming a teacher?

MR. SANDNER: I don't know. I couldn't make that judgment myself, your Honor. I'm not trying to avoid the question you pose, but I think that is a judgment -- I'm not a teacher and educator --

JUDGE HENDERSON: Do you want the rules to define how far a teacher has to go with a number of punches or comments, such as I just read, before it constitutes conduct unbecoming a teacher?

MR. SANDNER: No --

JUDGE HENDERSON: I don't see anything vague about that.

MR. SANDNER: No, the vagueness is that one can be charged with insubordination, which doesn't proscribe that excessive use of corporal punishment as one of the things that falls within the ambit of insubordination, but when

it is incompetence by use of excessive force --

JUDGE HENDERSON: Don't you think, Judge Oakes, that we have heard enough of that first point, and that we can pass on to the question, which is to me perhaps more interesting, and that is whether or not the School Board should, in substance, review its own finding, and so forth, do you think so?

JUDGE OAKES: Well, just to make sure that Mr. Sandner has made his point, as I gather it, your point is that the terms "insubordination, incompetence and conduct unbecoming a teacher" are all so vague that no teacher could understand just what conduct is proscribed.

MR. SANDNER: That is correct, your Honor. They are vague, they do not contain standards, as I have indicated, and there is no regulations that further explicate what the words mean.

JUDGE OAKES: How about the regulation of the local board that at least was in effect at the time of the third incident or the 1973 incident, wouldn't that

tend to make it specific enough so that violation of that regulation would clearly be insubordination?

MR. SANDNER: Our position is that it would not. It does not say, and I think men of common intelligence can disagree as to whether or not it could be interpreted to mean that insubordination is to fail to follow that policy which authorizes corporal punishment. Secondly, it clearly doesn't have any statement about or implication about conduct unbecoming a teacher. Thirdly, it doesn't contain a similar kind of indication or forewarning with respect to incompetence. So I would submit that the regulation, particularly in the light of the penal law, does not prescribe and adequately guidepost for the conduct which Mr. Kinsella is now charged with.

An important aspect, one last point on the question of vagueness under the attack on 3012, again, as I will get to my next point on 3020(a), the standard of insubordination, conduct unbecoming a teacher, and incompetence, those

terms are to be applied by a Bay Board of Education without any outside State guidelines or regulations to indicate or give them instructions as to how to apply those terms to this particular situation or indeed their rules and regulations. So while they may create rules and regulations of their own, they create them in a vacuum, and they apply them in a vacuum after the fact because they have no further guidance at that point as to how to apply the provisions that apply state-wide. Again, this can lead to discriminatory application across the state because the words in the statute are of state application and not of local application, but they are to be applied in a local setting.

With respect to our challenge on 3020(a), that statute provides, first of all, for the filing of charges with the clerk of the Board of Education. Five days thereafter the Board of Education is required to have an executive session, which is a closed session, open only to the board members

and its invitees, to pass on the question of whether or not there is probable cause. There are no guidelines with respect to what evidence is to be heard, who may come before the Board or indeed what the discussion may relate to. Subsequent to that, if there is a finding of probable cause, notice is sent to the Commissioner of Education for a hearing. Under the aegis of the Commissioner a three member panel, selected from a list of employees submitted by school boards and employee organizations, and the like, is convened. The Commissioner of Education assigns a hearing officer or perhaps a law officer, usually an attorney, to make rulings and run the proceedings of the panel.

JUDGE CURTIN: Is he one of the panel members?

MR. SANDNER: No, he is not.

JUDGE CURTIN: He is an attorney that -- I thought you said chairman of the panel -- what is his job with the panel?

MR. SANDNER: He is a law officer, he is not a member of the panel, he is not entitled to vote. He, however, in my experience

anyway, is entitled to make rulings of law and to operate the day to day operation of the hearing.

JUDGE CURTIN: Is his name taken from the list of the panel members, or is there any regulation indicating where he comes from?

MR. SANDNER: No, he is designated by the Commissioner of Education, presumably screened by the counsel's office to the Commissioner of Education, and as I say, my experience has been anyway, lawyers but not necessarily a lawyer. At the conclusion of the hearing process the charged person has a right to cross examine any witnesses, put his own proof in, and to argue to the panel. The panel within fourteen days of the close of the hearing is required to consider the case, make its findings and a recommendation with respect to those findings, and a recommendation, if any, regarding a penalty. All of that is packaged up and sent to the Commissioner of Education, who administratively --

JUDGE CURTIN: Are they also required to send a copy of their findings and recommendations

to the employee, the teacher?

MR. SANDNER: No, they are not.

JUDGE CURTIN: They are not? They don't, in other words --

MR. SANDNER: My experience has been that one way or the other we get them. We get them either from the Commissioner of Education upon request --

JUDGE CURTIN: As far as the plan of the statute, they are not required to?

MR. SANDNER: That is correct. Upon receiving this report from the panel, the Commissioner administratively turns it around and sends a report of the panel to the Board of Education, who then has under the statute thirty days to determine the case.

JUDGE CURTIN: The Commissioner has to act in a certain length of time, too?

MR. SANDNER: Yes, I believe within five days after the receipt of the report from the panel, he turns it around and sends it back to the Board of Education, and the Board of Education has to determine the case and assess a penalty, if any.

JUDGE CURTIN: Can you take it a little slower, please?

MR. SANDNER: Yes, your Honor.

JUDGE CURTIN: What can the Commissioner do when he gets the finding of the Board?

MR. SANDNER: The findings of the three member panel, your Honor?

JUDGE CURTIN: Of the panel.

MR. SANDNER: It says in Subdivision 4, your Honor, "Within five days of the conclusion of the hearing held under this section, the Commissioner of Education shall forward a report of the hearing, including the findings and recommendations of the hearing panel, and their recommendations as to penalty, if one is warranted, to the employee and to the Board of Education -- to the clerk of the Board." At that point we do receive a report.

JUDGE CURTIN: Can the Commissioner add to it or take away from it?

MR. SANDNER: No, he cannot.

JUDGE CURTIN: All the Commissioner's function is here is just a conduit?

MR. SANDNER: That is correct.

JUDGE CURTIN: There would be no reason why the panel -- outside, I suppose, of some kind of an administrative watchdog about time -- there is no reason why the panel couldn't send the findings

to the Board?

MR. SANDNER: Correct.

JUDGE CURTIN: Reading the section, as I understand it, the transcript of the hearing is not sent to the Board?

MR. SANDNER: That is correct. The report of the hearing panel is what the statute says is sent to the Board of Education.

JUDGE CURTIN: Is it a requirement that a transcript is made of these hearings before the panels?

MR. SANDNER: Yes, that is correct. The transcript is made, maintained, and upon request is available at no cost to the defendant.

JUDGE CURTIN: But that is sent to the Commissioner, is that it?

MR. SANDNER: It is my understanding -- but there is no regulation or law or rule about this -- it is my understanding that once the panel has completed its task, having had a copy of the transcript for its consideration, it is entombed in one of the files in Albany.

JUDGE CURTIN: They do not send that to the Board?

MR. SANDNER: That is correct.

JUDGE CURTIN: Does the section provide that a teacher can get it?

MR. SANDNER: Yes, it does, your Honor, at no cost.

Subdivision 4 continues: "Within thirty days of the receipt of such hearing or report, the employing board shall determine the case by a vote of the majority of such board, and fix the penalty or punishment, if any," and that can be from a reprimand to dismissal. It says further: "If the employee is acquitted, he shall be restored to his position with full pay for the period of suspension and the charges expunged from his record."

Subdivision 5 is called an appeal, and there is a right to either review the Board of Education's determination administratively by filing an appeal with the Commissioner of Education or by seeking relief in state court under Article 78 of the Civil Practice Law and Rules.

One other point that is crucial and key to our case is that in Subdivision 2 provides that an employee may be suspended. Suspension is not limited, indeed could be indefinite.

Now, with respect to all these aspects of the statute, we start out with the suspension problem. There has in this case today no suspension been issued against plaintiff Kinsella. Indeed --

JUDGE CURTIN: Your point is that he may be suspended before the hearing, is that it?

MR. SANDNER: That is correct, the statute so authorizes, and any time subsequent to the determination to hold the hearing he may be suspended. The brief for the Board of Education to this Court indicates that he has not been suspended, and it doesn't seem likely that he will be.

I call to the Court's attention the affidavit filed in this matter by the president of the Board of Education, and in Paragraph 4 thereof it indicates that they did not initially suspend him because they thought the thing would be over in a few days, and that would take care of their concerns about it. It says, Further, your deponent believes that the board of Education could

not reach that same judgment decision if the charges against plaintiff were not to be resolved for a number of months or perhaps a year, as may occur, if the action by the plaintiff herein results in extended litigation." Indeed that is where we are now. I would take that to mean that although the Board of Education has taken the position that it hasn't suspended him, there is a real threat that they may so do at any time. Indeed he is teaching now and can be suspended from his job. There is no limitation from that suspension. Indeed --

JUDGE OAKES: Maybe the Board of Education and the State Department have read the cases on constitutional law that pretty clearly would say that such a suspension, pending a hearing, is improper, and they are acting accordingly.

MR. SANDNER: Correct, your Honor, and we have cited Kennedy v Sanchez, and I note the State in its brief has analogized the procedure that was held unconstitutional in Kennedy v Sanchez to the procedure under 3020(a). Kennedy

v Sanchez, of course, as you know, refers to a pre-hearing suspension.

So that the first thing is the suspension problem. But even perhaps before that is the finding of probable cause. The lay Board of Education must make this finding. In this case the charges were preferred by the principal. The principal, clearly a subordinate employee of the Board of Education, undoubted may have discussed the matter with the superintendent, who is the chief executive officer, indeed even discussed it with the Board of Education at any meeting prior to the hearing on probable cause, the decision on probable cause. We don't know.

JUDGE OAKES: You assume that may be the case, as you say, but can we just assume that the Board, in finding probable cause, has been prejudiced by some previous talk with the superintendent?

MR. SANDNER: I wouldn't suggest that you have to assume there has been discussion, I said there may have been. But I would suggest that it has been

prejudiced by the mere fact of the relationship between the principal, superintendent and the Board of Education.

JUDGE OAKES: Isn't the Board of Education entitled to, you might say, a presumption of good faith in not prejudging such a situation?

MR. SANDNER: Ordinarily I would agree with your Honor, but I cannot in this case agree because of the charges set forth in Paragraph 5 of the charges, which refers to an earlier proceeding, determined in February of 1971, in which the Board of Education found plaintiff Kinsella guilty of conduct unbecoming a teacher, and punished him for that conduct, and now two years later are apparently using the fact that he was found guilty and punished once before as the basis for the finding that he is incompetent. So apparently they didn't do enough the first time, and they are trying to do something more now. I think, and I submit to the Court, that that indeed shows bias and prejudice in

this case. I submit also the employment relationship of the employees making the charge can lead to this. I submit also that the counsellor for the Board of Education, counseling the Board of Education, prosecuting the charges, leads to the conclusion there is bias. Now --

JUDGE CURTIN: How could the Board get the information about any conduct of the teachers unless somebody told them about it?

MR. SANDNER: They couldn't, your Honor.

JUDGE CURTIN: Isn't that the very essence of their function, to supervise the work of education in that particular district?

MR. SANDNER: That is correct, that is correct. However, the conclusion of the statute is the important part-- I have run through it part by part, but you have to take the statute as a whole, obviously -- they are the ones that make the ultimate decision about it, and in that case, in the Supreme Court case, it clearly indicates the necessity for an impartial decision maker.

JUDGE CURTIN: You have to start somewhere with somebody making a complaint, and

somebody making a decision about 'we ought to do something further here,' and it seems to me that the best body to do that would be the Board, that is their job.

MR. SANDNER: But -- that is true, they have the job of running the school district, however, there is also the question of making an impartial determination.

JUDGE CURTIN: All right, that is the end result.

MR. SANDNER: I would say initially also to avoid possible harrassment in support of administrators against teachers, and so on. But I agree with your Honor that the fact is they come back and later judge the matter, and that is really why any prejudice or bias is important to search out in the first instance.

Then we go, once the probable cause has been found, to the hearing, and what is the hearing? This is a creature that is run administratively by the Commissioner of Education. He designates a hearing officer, and three members of the panel are selected, in accordance with the regulations,

from these lists, and they sit there and they hear evidence, they hear witnesses. I point out, and we have not directly challenged every single aspect of this, but for example, there is absolutely no way to review any rulings of the hearing officer. The determinations made by the Board of Education is not based on what is on the transcript and the conduct at the hearing. We have no opportunity to go before the Board and say the ruling of the hearing officer regarding admission of this evidence, or an inclusion of other evidence was improper, and so on, and indeed the review contemplated in the appeal provision, Subdivision 5, does not allow us to go back to the actual conduct of the hearing. There is no intermediate or administrative regulation or rule that in any way allows us any latitude to somehow control the conduct of the person who is running the hearing. But our complaint really with respect to this hearing is not that it is held at all and there may be

deficiencies with it, but that it is a sham. It is an exercise in absolute futility.

We have cited in our memorandum the Supreme Court case in New York, which says that it is purely advisory and not binding on the Board of Education, the Commissioner of Education, and it is so held in other cases. We have cited one as an example. So what purpose the procedural due process requirements of notice and opportunity to cross examine and put in evidence, and to challenge the assertions that are made by the complainant? Those evidentiary matters, the very facts on which the conclusions of fact and conclusions of law must be based, never reach the Board of Education.

That brings us to the final step --

JUDGE OAKES: You say they never reach the local board. Do you have any indication that if they wanted the transcript they couldn't get it?

MR. SANDNER: No, obviously they can purchase a copy of the transcript. The statute

does not require them to review that, and I contrast that with the administrative procedures that are alluded to in the defendants' brief, under the federal law where a transcript indeed -- in fact, Mr. Cream's letter brief on Broderick analogizes 3020(a) to the statute there, and indeed that talks about a transcript being available to the decision maker. In this case it can be made available if they want to buy it, but there is no regulation, no statute that requires them to buy it, that requires them to consider it, that requires them in any way to rationalize their decision upon the evidence adduced at that hearing or not adduced at the hearing. Your Honor, I might at this time mention that we have alluded to this problem about rationalizing the decision so that on a review, if there is a viable review, you can make some kind of a wise judgment about the determinor and how he reached his conclusions. We alluded to this in

our memorandum in chief and our reply memorandum, but due to circumstances of time, we have not had sufficient time to brief that. We do have a four page letter and, with your Honor's permission, I would like to submit that. It cites a number of cases, including United States v Mertz, among others, regarding that question.

JUDGE OAKES: We would be happy to have some enlightenment.

MR. SANDNER: So then the matter goes to the Commissioner administratively and the report of the hearing panel, which contains its findings of fact perhaps, and it contains its recommendations certainly, and recommendations regarding penalty, if any, that goes to the Board of Education, and they have a meeting, and it is another executive session, closed to the public -- excuse me -- except its invitees, and then they bring in the School Board attorney.

JUDGE CURTIN: Is that in the statute?

MR. SANDNER: Yes, your Honor.

JUDGE CURTIN: Now we are at the Board?

MR. SANDNER: Yes, your Honor.

JUDGE CURTIN: When the Board gets the recommendation, what does the statute say that the Board can do?

MR. SANDNER: The only thing the statute says respecting the Board of Education is within thirty days of the receipt of the hearing report, that is the report of the hearing panel, the employing board shall determine the case by a majority or all of the members of such board, and then fix a penalty or exonerate the person. What elements are operating now at this time? If the Board does not have the transcript, does not rationalize its decision, we don't know what evidence, if any evidence at all, what people they may have had at their meeting, they may call everybody in again and say, 'What do you think about this?,' and they say, 'We don't like it,' and they will say, 'Fine, we will not agree,' assume the panel found no cause for action and recommended exoneration --

JUDGE CURTIN: Does the statute require the Board to make any findings?

MR. SANDNER: No, it does not.

JUDGE CURTIN: None at all?

MR. SANDNER: That is correct, sir. There is no opportunity if the Board of Education is considering other evidence or considering the statutes or arguments, for notice to us. Under the regulations cited by the defendants, the federal law, you have a right, if the tribunal decision maker is going to consider something else, you have a right to state your position with respect to it. Here we have none of that.

JUDGE OAKES: Is there any indication in the past that the boards have gone outside the record or outside of the findings? This is just an allegation that they might, is it not, your argument?

MR. SANDNER: On the face of the statute, it does not limit, it does not instruct, it does not guide laymen with respect to what they are supposed to do. They are supposed to determine the case. They may do anything. They may do it properly, they may do it

improperly. Our argument is that it requires adequate instructions and guidelines to provide thorough and proper review of the matter. In fact, one case that came before the Commissioner of Education, a teacher had been found guilty of an act, and it was argued to the Commissioner of Education that the Board did not rationalize its decision, that indeed it never read the transcript, and that this was arbitrary and capricious and without due process. Indeed in that case five of the board members had given affidavits to the appellant teacher that they had not indeed read the transcript, and the Commissioner found that was all right, no requirement with respect to that.

JUDGE HENDERSON: How would you ever conceivably bring any proceeding under Article 78 in the state court for final review if you didn't have findings and conclusions somewhere for that court to review?

MR. SANDNER: It makes the job extremely difficult, your Honor.

JUDGE HENDERSON: I don't see how a state court could

do it. I would think they would remand it, demanding that findings be made.

MR. SANDNER: The grounds for review, as your Honor knows, under Article 78 in that case would be a review from the determination of the board or board of officers making the decision, and that it is indentical -- that is what the statute says, Subdivision 5 of 3020(a) -- identical to the scope of the review before the Commissioner of Education. Both of them, as an appellate process, are entitled to review the determination of the Board of Education only, not what happened at the hearing, not what the report of the hearing panel said, not the transcript and the evidence, but what the determination of the Board is.

JUDGE HENDERSON: Well, you have to review something under Article 78 in the state courts.

MR. SANDNER: It makes it very difficult. If I may, your Honor, in my own experience I have seen cases where exoneration or de minimis penalty has been

recommended by a hearing panel, and the Board of Education, in a letter decision, has said simply, 'We do not agree with the panel's recommendation, and we find a suspension in the amount of so much time without pay the appropriate measure.' Now, that presents me with a great task of trying to attack it. I can say it is arbitrary and capricious, not founded on the record, and so on. That is what I start with, that determination, and I can allege all these things that your Honor asked me, what happened at the hearing, did they look at the record, I don't know any of that. We have to start from scratch to try to --

JUDGE OAKES: You have no right to be present in the deliberations of the Board?

MR. SANDNER: That is correct, your Honor. And to follow up on the administrative aspect of it, the Commissioner of Education is an administrative officer, and, as I have indicated, the right of appeal is illusory. Indeed, as the Second Circuit pointed out in the

Russo case, in the footnote therein, the appeal procedure to the Commissioner of Education is an informal round table discussion at which the litigants are there on papers. There is no hearing, we have no right to a trial de novo. Indeed we do not review what has transpired at the hearing, we review the determination of the Board of Education. So we never get a chance to litigate the propriety of hearing officers' rulings, for example, or in any way to comment on the evidence that is adduced.

JUDGE OAKES: I have been asking you a lot of questions, so we have taken up some of your time. If you want to have some time for rebuttal, you better wrap up your argument in a few minutes.

JUDGE HENDERSON: My point was, in that Article 78 comment, it seems to me, even though the statute does not provide for certain steps to mandatorily be taken, that there is a right to go to the state court under 78, and I am raising the question whether it isn't implicit in that right that

steps would have to be taken for a thorough review under Article 78. You say they don't do that?

MR. SANDNER: Subdivision 5 of 3020(a) does give you the alternative remedy of appealing Article 78, but it does not describe what you review, the extent of the review or what you may review. It only says you may review the determination of the Board of Education. That is what the statute says, in any event, you can review the determination of any body or officer.

JUDGE HENDERSON: Don't you have implicit in that a belief and an understanding that it would also involve a review of the transcript, even though the statute doesn't say?

MR. SANDNER: I don't believe that is the case, your Honor. In the Latart case, which we have cited, a state court case, and an Article 78 proceeding, getting into the transcript, and so forth, is wholly irrelevant in that court's opinion, inasmuch as it is not binding, it is advisory only, so why waste the time considering that, go directly to

the determination of the Bd. of Education.

JUDGE CURTIN: Do you have other cases, in addition to Latart, that have dealt with this particular problem?

MR. SANDNER: That is the only one cited. There may be other Supreme Court cases, your Honor. The Commissioner of Education has decided that in a recent case, the matter of Carlin, and cites Latart for the same proposition.

JUDGE CURTIN: Did the Commissioner write a decision on it or was that just a two or three line finding?

MR. SANDNER: It was a two page, legal size, decision in the matter of Carlin, cited at Page 31 of our memorandum.

JUDGE CURTIN: That wouldn't be much help to us because we don't have it.

MR. SANDNER: We will be happy to provide your Honors with a copy of that decision. It is a slip opinion, decided in April 1973. It is not reported in any book at this particular time.

JUDGE HENDERSON: If this panel were to abstain in this proceeding, and let you run the course of that hearing, I assume you would

violently oppose that abstention, and have some comment as to why you believed it was improper, is that right?

MR. SANDNER: That is correct.

JUDGE HENDERSON: What would you say in a nutshell, why couldn't this Court properly abstain and let you run the course in the State process and the Educational Law process?

MR. SANDNER: For several reasons, your Honor. One, every aspect of the statute under which we would have to subject ourselves in the hearing --

JUDGE HENDERSON: We would keep control of it if we abstained -- I assume, I haven't talked to my colleagues about it -- but if we were to, we would keep control of it pending the event of the State proceedings.

MR. SANDNER: If you were to abstain and allow the hearing to proceed under the statute as it now stands, every aspect of the statute we are challenging as being unconstitutionally defective, and therefore we are subjecting a person's constitutional rights to an unconstitutional procedure. Secondly, there is

the instant matter, as indicated in the affidavit of the Board of Education, of a suspension during this period of time. Thirdly, the discussion we have just finished, regarding the futility and the inability of us to get proper review subsequent to the determination by the Board of Education. I would strongly urge that abstention is not appropriate, and I don't believe it is required under the cases, and --

JUDGE HENDERSON: I wanted you to have an answer to that question. That is not any conclusion on my part. I certainly have not talked to my colleagues about it.

MR. SANDNER: We contend that, as the Supreme Court has held, the essence of due process requires an appropriate hearing at a meaningful time and place before someone can be deprived of many of his protective rights and benefits, certainly in this case his occupation, his right to practice his occupation, his salary for that occupation are serious and important constitutional benefits which should be protected. We submit that the hearing procedure which we have

just detailed does not provide a meaningful hearing at a meaningful time in an appropriate way. We will submit the letter that I mentioned to your Honors upon the completion of argument.

JUDGE HENDERSON: You had, I take it, proceedings before the state courts under Article 78, is that right, in like cases or similar cases?

MR. SANDNER: Personally, I don't believe I have had any reviewing of a tenure dismissal or tenure hearing cases, myself.

JUDGE HENDERSON: I'm talking about charges of insubordination, conduct unbecoming a teacher, and the like, have you ever had that up under Article 78?

MR. SANDNER: No, I don't think so, your Honor.

JUDGE HENDERSON: I simply wanted to know what happened to you up there, because I don't know what you would say, as an advocate. If the circumstances were as you described, what would you ask them to review?

MR. SANDNER: I don't have any case of personal experience to give to your Honor. I can only recite again the Latart case in which that was raised, and it was

relevant to that decision, the Court choosing to apply some standard that apparently it knew about, that the board's decision was not arbitrary and capricious, because it found that the board could make a determination under the statute, and that the panel hearing report was only advisory. Thank you.

JUDGE OAKES: Thank you, Mr. Sandner. Mr. McAskill?

MR. McASKILL: Good afternoon, Judge Oakes, Judge Henderson and Judge Curtin. I am here today at the request of Mr. Thomas David, who acts as special counsel for the Sweet Home Central School Board, and I will be very brief.

First of all, when this hearing was proposed we were asked, as counsel, to inform the Court whether or not we had any factual matters to present. In answer to that I said no. However, in view of comments in the brief of counsel for the plaintiff, I think I should clarify three factual matters.

First of all, the date of the last incident involving Mr. Kinsella is not February 23, 1971, it is February 23, 1973.

JUDGE [illegible]: I think that is conceded.

MR. MCDUFFIE: I think that is conceded by counsel.

Secondly, I think I may have misled the Court by my own brief, and I want to be very clear about that. On Page 11 of my brief I referred to the participation or lack of participation of Mr. David in these proceedings, and Mr. David telephoned me and said that he thought that comment might be misleading. He referred me to his affidavit which is before the Court and, in fact, Mr. David did participate in the finding of probable cause to the extent that he presented those charges. However, the point I made in my brief is that he did not participate personally in the decision of the panel -- excuse me -- of the Board in the finding of probable cause. That was my point and I want to make that clear.

Thirdly, counsel in their brief refer to the fact that the regulations of the School Board were not promulgated until November 16, 1972. Actually, that was an amendment of regulations which had been on the books since 1961. I

have an affidavit with me today from the president of the Board of Education of the Sweet Home Central School Board to that effect, if the Court wishes to consider it.

JUDGE OAKES: Does it set forth what they were before?

MR. McASKILL: Yes.

JUDGE OAKES: Have your opposing counsel been furnished with a copy of that affidavit?

MR. McASKILL: Not yet because I didn't know what the Court's position would be on that, in view of the fact I said that I had no factual material to present.

JUDGE OAKES: I think you ought to give it to them. I think we ought to have it before us.

MR. McASKILL: If counsel has no objection --

JUDGE OAKES: We will take it whether counsel has any objection or not. But if counsel wishes to submit counter affidavits, we will give them leave. Certainly it is not going to be decided today or tomorrow any way, so they will have three or four days, and if they need any more time they can apply for it, to file counter affidavits. But we will take that affidavit.

MR. McASKILL: I will first address myself to

Section 3020(a), which is the procedural section, and I would first refer to Judge Henderson's comments in his decision of June 21st, where he stated what was particularly interesting to him in this matter. It appears there are four reasons why counsel for the plaintiff wishes this Court to strike down Section 3020(a). First of all, they refer to what they call the dual role of counsel for the School Board. I respectfully suggest to this Court that the section itself makes no reference to the role of counsel for the School Board. The only place attorneys are mentioned in that section is in the section which says that both sides, the School Board and the employee, may be represented by counsel at the hearing. It makes no reference to what the role of the school attorney shall be, either in the presentation of charges, in the deliberation of the Board when they make a finding of probable cause, in the deliberations of the panel when impaneled, nor in the deliberations of the Board after the panel report is

received.

JUDGE OAKES: Couldn't it carry with it the implication at least at the hearing before the so-called independent or objective hearing board that the counsel for the School Board is really presenting one side?

MR. BROOKS: No question about that. He is the counsel for the School Board, as the statute provides, that is correct. However, the statute doesn't say that that attorney will participate in the deliberations of the Board when they find probable cause, nor will he participate in the deliberations of the Board after they receive the report.

JUDGE OAKES: At that point when the School Board appears by its own attorney before the independent hearing board, hasn't it then become a party to the cause, and isn't the ultimate thrust of the real issue, and the one that Judge Henderson was foreseeing and commenting on, the real issue that the School Board becomes, in effect, the charging party, then has its own counsel appear before the hearing board, and then can, with absolutely no guidelines, cast aside

the findings of the hearing board and make its decision willy-nilly?

MR. HEADSKILL: I am not sure that I agree with your comments, your Honor.

JUDGE OAKES: It is a question though, isn't that the real issue or the real --

MR. HEADSKILL: In substance, that is correct.

JUDGE HENDERSON: What was that last sentence you said there?

MR. HEADSKILL: I said in substance, that is correct, your Honor. The School Board is the party which offers the charges against the teacher, and eventually will determine the matter after having a report from the panel.

The second thing I would address myself to is that counsel for the employee or the teacher has stated that he does not have the right to be present when the School Board is making its findings, and I don't know what Mr. Sandner's experience has been, but I have been trying cases in this county for eighteen years, and I have never been in a jury deliberation room yet, and I don't think I'm ever going to get invited.

JUDGE OAKES: Yes, of course, but isn't the point there however, and perhaps I misled Mr. Sandner by misuse of terms, isn't the point there that counsel has no opportunity under this statute or the regulation to present any evidence before or to make any comment to the Board? Not that he wants to be in the board room while it is deciding the case, but that he has no opportunity to counter the findings of the hearing board.

MR. McASKILL: Just as in any civil or criminal trial, your Honor, his opportunity is presented in the courtroom during the course of the proceedings.

JUDGE OAKES: You mean at the hearing?

MR. McASKILL: That is right.

JUDGE OAKES: Once that has come down, so to speak, he has no further opportunity before the Board of Education.

MR. McASKILL: That is right, your Honor, nor would I, as an attorney representing a client, have an opportunity to be present in the judge's chambers while he is making up his mind in deciding my case.

JUDGE OAKES: No, but if you are appealing from a decision of the district court, you have

an opportunity to appear before the Court of Appeals, even though you are not there at the time they decide the case.

MR. McASKILL: In this case, were Mr. Sandner to decide to take an Article 78 proceeding, he would, of course, have an opportunity to appear before the judge in that proceeding.

JUDGE OAKES: But he has no opportunity to appear before the Board of Education at the time at the time it reviews its findings.

MR. McASKILL: I submit there is certainly nothing unconstitutional about that, and if he had that opportunity, I would certainly like to get an opportunity to get inside that jury room and talk to those people when they are deciding my case.

JUDGE HENDERSON: The School Board attorney has a right to be there.

MR. McASKILL: That is correct, although he does not participate in the deliberations.

JUDGE HENDERSON: The School Board attorney is there, he gives advice and direction, and evaluates for the School Board what he thinks probable cause is, and gives other legal advice.

MR. McASKILL: The statute does not provide, your Honor, that he be present.

JUDGE HENDERSON: But he may be, but the plaintiff's lawyer may not be.

MR. McASKILL: The statute doesn't comment on that, your Honor.

JUDGE HENDERSON: The practice is that he is there.

MR. McASKILL: Apparently the practice is.

JUDGE HENDERSON: All right.

MR. McASKILL: Thirdly, the attorney made mention of the fact that the Board does not necessarily have before it the record of the hearing before this three man panel. Now, the statute doesn't say that they can't order that record or they must not order it, not does it say they must order it. I am certain that if the Board wanted to have a record of the proceedings at the hearing they would and can order the record. What the statute says is that it will be available to the teacher without charge. It does not say that the Board cannot or must not consider the record when they are making their deliberations, and I would certainly assume that they would order it and read it. On that

point, again, with Judge Henderson's question about the Article 78 proceeding; certainly, in any Article 78 proceeding that I have been involved in, and I am certain this case would be the same, both sides can and probably would order the record. Not only that, the recommendations and findings -- and the findings apparently are findings of fact and law by the three man panel -- are made available to the employees, the statute says they must be, and the Commissioner also mails them to the Board, so that certainly would be part of the record, both sides have it in their possession, and the teacher is entitled to a copy of the transcript, the complete transcript of the hearing, at no charge to him, he has it in his possession, and I'm certain that the attorney for the School Board would order the record printed for his use, and I am sure that the entire record would be presented to the judge who heard the Article 78 proceeding. That is in answer to Judge Henderson's question, 'I don't see how the matter

could be decided without it.'

JUDGE OAKES: What about the other side of the coin, what is to prevent the Board of Education when it reviews the findings of the hearing board from going outside the record and looking at we will say past efficiency reports of the individual teacher or perhaps calling in witnesses or the complainant or hearing something in executive session that the teacher or his counsel have no opportunity to counter?

MR. McASKILL: Again, your Honor, the statute does not comment one way or the other, and it is the statute we are talking about here.

JUDGE OAKES: There is nothing to prevent that.

MR. McASKILL: That is correct.

JUDGE HENDERSON: That is the basic argument of Sandners, that the statute is faulty, it permits this line of conduct whether it happens or not. I think that is what he is complaining about.

MR. McASKILL: As I read the statute, it says the Board shall review the report of the panel. It doesn't say it shall review the --

JUDGE HENDERSON: That could be ten words, that report --

MR. McASKILL: My point is, your Honor, it doesn't say the Board shall review the findings of the panel and anything else they can get their hands on. It says they shall review the report of the panel. I don't think the statute permits the Board to go outside the report.

JUDGE HENDERSON: That isn't my view of it in studying this problem. I understood they could, if they wished, take other proof along the lines that Judge Oakes suggests.

MR. McASKILL: The statute doesn't say they can.

JUDGE OAKES: Supposing there were a rule of law that they could not, how would it be known whether they did or not?

MR. McASKILL: How could it be known?

JUDGE OAKES: Yes.

MR. McASKILL: In the same way we find out whether a jury has ever done that in a civil case, you get affidavits from the jurors and find out --

JUDGE HENDERSON: You don't think the School Board is going to give to anyone the mental processes that went on in an executive meeting, do you, or be compelled to?

MR. McASKILL: I think they could be compelled to if it was --

JUDGE HENDERSON: Where is that right found? I don't know of any such right described in the law.

MR. McASKILL: My understanding of the Article 78 proceedings is that --

JUDGE HENDERSON: You mean in the courtroom. But you don't go to the School Board -- Kinsella couldn't go and say 'I want to know,' and demand to know what went on in that School Board meeting, could he, except by review under 78?

MR. McASKILL: That is my point, by review under 78, on the grounds it was arbitrary and capricious.

JUDGE HENDERSON: Yes, but you won't find out what a jury does under Article 78, you hope that the jury will respond to your questions, that is what you hope for.

MR. McASKILL: Yes, sir.

JUDGE HENDERSON: All right.

MR. McASKILL: The fourth and last point that is apparently made here is that the Board is not required to follow the recommendations of the panel, and I won't take much time with that, except to point out, as I did in my brief, that a judge, who appoints a referee under

New York civil law or federal civil law, is also not required to follow the findings of law of the referee, nor is he required to follow his recommendations as to the ultimate decision of the case.

JUDGE CURTIN: When that occurs, at least I know it is the federal rule, the circuit panel supervises that very carefully, we must give reason, and, as I read this, in a case where the board rejects the panel's findings and recommendations, they are not required to give any reason.

MR. McASKILL: I think that is true, your Honor, under the statute.

JUDGE CURTIN: If that is the case, and they don't follow the recommendations of the panel and there is an Article 78 proceeding, what would the court have to review then, how could they review it?

MR. McASKILL: I think that gets us back to Judge Henderson's question again on Article 78, the claim is that the decision was arbitrary and capricious. I think the manner in which the board arrived at its decision, contrary to the panel,

could be investigated by use of affidavit testimony or what have you, they could be subpoenaed and brought into court.

JUDGE CURTIN: The trouble with that is that then the board, let's say, six or eight months or even a year later are called as witnesses, and they have to reflect back as to what their reasons were on some decision they made a year before.

MR. McASKILL: I think that would be the case. I must say that, like Mr. Sandner, I have never been involved in an Article 78 addressed to the school board. I am not a school attorney, I have never had that experience. I don't know the answer.

JUDGE OAKES: Maybe people think it might be futile under the present statute. Are there such?

MR. McASKILL: I know of one which was brought that I was not involved in, but later got involved in from another standpoint.

JUDGE OAKES: You have mentioned those four points, and I think we understand your contentions in those respects. I would like to ask whether the Board takes the position that it does have the right to suspend the plaintiff before a

hearing?

MR. McSKILL: Apparently this particular Board, and I do not know any of the members nor have I ever had conversation with them, apparently, in view of their treatment of Mr. Kinsella in this case, they took the position they do not have this right.

JUDGE OAKES: Are you in a position that you can concede, for the purposes of this case, that at least until this matter has been decided by this Court, and until a hearing has been held, that he will not be suspended?

MR. McSKILL: I must apologize to the Court on that point, I am not in that position in this case.

JUDGE HENDERSON: Is the School Board attorney here?

MR. McSKILL: I don't know. Is Mr. David in the courtroom? Apparently not.

JUDGE HENDERSON: Maybe after you finish up here you can get on the wire and give us an answer to that.

MR. McSKILL: I will certainly do that.

JUDGE HENDERSON: Judge Oakes and both Judge Curtin and I are extremely busy, and we are off and running with the fall season, so we cannot guarantee that we are going

to turn this out in a day or two, and it would be a comfort to know that the Board would continue its position on that until we have a reasonable crack at it.

MR. McGILL: I will get an answer today on that question, and present that answer to you, your Honor.

JUDGE HENDERSON: All right, very good.

MR. McGILL: Briefly, on the other question involved in this lawsuit, and I will be very brief on that, I think the Broderick case amply covers the point, to me the point is this. I just can't imagine how anyone, who is a school teacher in the State of New York, would find the language of Section 3012 vague. I can't imagine it, and I don't think I need say anything farther than that. If the acts this man is accused of doing occurred, I certainly think they come within the purview of the language of the section. I don't see how any reasonable man could say otherwise. That is about all I have to say.

JUDGE OAKES: You want to be sure to give us that affidavit.

MR. [illegible]: I have it here, your Honor.

JUDGE [illegible]: With a copy to opposing counsel. Mr. Cream?

MR. CREAM: May it please the Court: I would like to first address myself to the question which appears to be giving all the parties concerned here some difficulty, and that is what is a court going to review in an Article 78 proceeding should the Board of Education choose to proceed without a transcript.

First I would like to point out that there are regulations promulated by the Commissioner dealing with the distribution of the transcript, and those regulations are found in Title 8 of the New York Code of Rules and Regulations, Part 82, which provides at Section 82.10 that the hearing officer shall provide for the preparation and delivery of one copy of the transcript of the hearing to each panel member and to the employee, if requested, and that the complainant and the board may order copies of the transcript directly from the stenographer. Now, granted that the language in that

regulation is "may order copies" and not shall order copies, but I think at this point, your Honors, we would be picking at straws to suggest that under these regulations and the statute and Article 78 of the Civil Practice Law, read together, that the board could proceed to make a determination without having ordered the transcript. I think should a board have acted in such a manner that that action itself would be reviewable by Article 78 in the state court should the teacher so decide to use that avenue of appeal, and that in itself might well be arbitrary or capricious. As to whether the School Board has gone outside the record to make a decision, one of the grounds under Article 78 of the CPLR for the review of an administrative determination is whether the decision of that administrative body is supported by substantial evidence on the record, that is the language of the statute, and the School Board would therefore be required to come forward and defend its action strictly on the record before it.

JUDGE OAKES: I am not sure that that follows, does it really? There might be substantial evidence in the transcript, but there might be opposing evidence in the transcript before the hearing board, but the school board might well make its decision on something entirely foreign to that, and that would not appear in the transcript in the Article 78 proceeding.

MR. CREAM: That is correct, Judge, but there would be a judge reviewing the decision of that board, looking only at the record to determine whether the board's decision was arbitrary or capricious or not based on substantial evidence.

JUDGE OAKES: Assuming that it is not based on substantial evidence, but that they went outside --

MR. CREAM: Well, following your hypothetical further your Honor, what harm to plaintiff should the record provide substantial evidence for the board's decision and, in addition, the board considered other evidence?

JUDGE OAKES: Well, the only thing is that he hasn't had an opportunity to meet that other

evidence if it were presented.

MR. CRILLY: Well, why should he have to meet it, your Honor, if the court, in reviewing the Board of Education's decision, is going to look strictly at the record, and if that record doesn't show substantial evidence for the Board's decision, that Board's decision is going to be overturned, and if that court doesn't do it, then the appellate division will, your Honor.

JUDGE GRIFFIN: You have indicated that you thought if the Board didn't get the transcript and then made a decision that -- I would suppose especially if they did not follow the panel's recommendation -- that you would think that the state court would say this was arbitrary and capricious. What if the Board didn't give their reason, they didn't say why they have fired the teacher, would that be arbitrary and capricious, in your opinion?

MR. CRILLY: In an Article 78 proceeding, the entire record, including the record of the hearing and the report of the hearing officer to the Commissioner, his report

to the School Board, would be before a court. The court would be reviewing the entire record to determine whether a decision made by the local Board of Education is supported or is reversible on the various grounds under Article 78. I don't know that I could represent to this Court that a decision by the Board without reasons would per se be over turned on those grounds, but the decision by the Board certainly could be overturned based upon the record before the court. So the failure to give reasons, I would again have to ask what harm, if the court reviewing that decision has before it the record, and certainly were any attorney to be representing a teacher in this sort of a proceeding, he would be certain to have that record, including the transcript before the court making the review under Article 78.

JUDGE OAKES: What you are saying in substance is that the Article 78 review procedure saves an otherwise deficient statute.

MR. CREAM: No, your Honor. What I am saying is that the Article 78 procedure should be

read together with the Educational Law procedure in order to provide the judicial review which is present. I think that the procedure being followed--

JUDGE HENDERSON: You are conceding that, as I understand it, the statute requires, for thoughtful resolution of the statute, a consideration of a potential Article 78 proceeding?

MR. CREAM: Certainly, your Honor.

JUDGE HENDERSON: It is so vague and so lacking, standing by itself, that you have to read 78 in order to make sense of it?

MR. CREAM: No, your Honor.

JUDGE HENDERSON: That is what you said. You told Judge Oakes that you had to read 78 in order to understand the basic statute.

MR. CREAM: The basic statute here, your Honor, is Section 3020(a), and Subdivision 5 of that statute provides for appeal either to the Commissioner or by Article 78 to the state courts.

JUDGE HENDERSON: If you don't read 78 and all the case law under it, you can't understand the basic statute.

MR. CREAM: If you only read 78, your Honor, the basic statute is understandable. If

you remove the grounds for appeal from this statute, then you are dealing with a different statute. But we have the grounds for appeal and we have the judicial review. I think that, taken together with the rest of the statute, provides due process to this plaintiff and to any other plaintiff for a review of the Board's decision.

JUDGE HENDERSON: Don't think because I ask questions with zeal that I necessarily agree with my thoughts. I am trying to get your thoughts.

MR. CREAM: I appreciate that, your Honor.

JUDGE CURTIN: Mr. Cream, isn't there a basic notion in our law -- you have a teacher tenured, he would have at least three or four years in service, he might have fifteen or twenty, and a proceeding is started and he is fired. Now, don't you think that our notions of fairness in this country say that the people that fire him must tell him why.

MR. CREAM: I don't read anything, your Honor, in the statute that says that the Board does not tell him why.

JUDGE CURTIN: The Board can tell him why, but they are

not required to.

MR. CREAM: Your Honor, are we going to look at a statute, and look at the administrative agency's action under that statute, and assume the administrative agency to do everything possibly wrong under that statute?

JUDGE CURTIN: No, no, I am asking you isn't that generally the notion under these circumstances that you tell the man why?

MR. CREAM: Yes, I would agree with that, your Honor. I think the Supreme Court in Marcy made that fairly clear, that when you take that action you tell him why. I find nothing in the statute that prohibits that.

JUDGE CURTIN: I agree with that.

MR. CREAM: In addition to that, your Honor, I would point out that the plaintiff under the statute is informed of what charges are against him, and I think it may not be stretching too far to see that should he be found guilty, should the Board make the recommendation that he be fired, that it is reasonable to assume the reason is because the charges have been sustained. I don't think there is

a particularly difficult question involved here in apprising the teacher in this circumstance of the reasons for the Board's action.

JUDGE CURTIN: There might be five or six charges, and the Board might disregard four and find one, and I think that when that comes to review it certainly would be much simpler in the Article 78 proceeding if they said, 'Well, the Board's decision was based upon charge one,' otherwise they would have to look at the whole business of all the charges because they wouldn't know.

MR. CREAM: Then, your Honor, aren't we talking about judicial economy rather than basic due process?

JUDGE CURTIN: Yes, I suppose so.

MR. CREAM: Turning to the question of judicial economy, it has been the position of the Commissioner at this proceeding that this is a premature proceeding, that plaintiff has not the standing to come before this Court at this time to complain at all about Section 3020(a) or 3012 of the Education Law, that he has not been suspended, nor to my knowl-

Judge has been threatened with a suspension.

JUDGE OAKES: The threat is there in the statute, isn't it?

MR. CREAN: I would submit, your Honor, that the amount of time which has passed between the bringing of the charges and the restraining order of this Court, had the Board intended to suspend him, they would have done so. I, also, cannot speak for the Board that he will not be suspended. However, the suspension notwithstanding, the only other injury possible to the plaintiff in this case which the Court might protect is the injury of having to be engaged in these proceedings, and we know from reading the law on the injunction against criminal proceedings that simply becoming involved in an administrative proceeding and in a criminal proceeding is not the irreparable injury necessary for the enjoining of that procedure, he does not face anything other than the involvement in the hearing. The amount of energy expended in this case to date by the litigants and the Court could

[illegible] become moot, and might yet become moot, should the hearing go forward, since he could well be acquitted by the Board. It is our position, your Honors, that before the Court need to act in this case, the Board of Education would have to find him guilty of the charges and order some punishment, at which point the irreparable injury, the threat of that would come in. We maintain at this point there is not a threat to legally protected interests.

[illegible] At what point in these proceedings has the threat of suspension not become a threat, when even today no one can say whether or not he is apt to be suspended, when suspension, in effect, has been enjoined, I would assume that was a great threat from the word go.

MR. CROSS: Your Honor, had he been suspended, you would have the question before the Court as to whether the unusual circumstances necessary for that suspension were present, and we do maintain that [illegible] portion of the statute, which provides that it is permissible to suspend prior to the hearing, is

constitutional because of the possibility of the unusual circumstances between a teacher and children. I don't think any of us would want to have a school teacher present who has assaulted children seriously or has engaged in other conduct which seriously threatens the health and safety of school children. I think that portion of the statute is clearly constitutional. In any event, plaintiff lacks standing, he has not been suspended.

Likewise, as to the equal protection argument, your Honors, and I must say I was somewhat taken aback by the argument of counsel this morning, since the complaint in Paragraph 26 recites only that equal protection may be denied a non tenured teacher as the basis of the equal protection argument. Likewise, I believe that the Supreme Court in Broderick has fairly well clarified what standing plaintiff has here to complain of a possible chilling of First Amendment rights. The activity which he participated in was one of conduct, not one of speech.

point the other issues that have come before the Court have already been well argued by the attorney for the Board here, the questions have been searching, and at this point, absent any other questions, I have nothing further for the Court.

MR. SANDNER: Your Honor, I would like to ask your permission for leave to have Mr. Ashe present our brief rebuttal.

JUDGE [illegible]: Very brief.

MR. [illegible]: I would like first, your Honors, to refer the Court's attention to Gibson v Buryhill, with respect to the argument just made by the Attorney General, with respect to the fact that we should be required to go through the administrative procedure before coming into this court or any court. I think that Gibson v Buryhill makes it clear that where the adequacy of the administrative procedure itself is in question, that there is no prior requirement of exhaustion of the administrative remedy before coming into federal court, under 42 U.S. 1983.

JUDGE HENDERSON: I didn't advocate it, I just asked Mr. Sandner what his reaction would be --

MR. DEAN: My response was to Mr. Cream's argument that we should be required to exhaust, and not to your Honor's question. But your Honor's question with regard to the Article 78 procedure and to the question of review I think is very critical.

As your Honors are probably aware from the correspondence, we are institutional lawyers, as that term is sometimes used, and we are involved in a great many Article 78 proceedings. As Mr. Sandner has indicated, we have not necessarily been involved in any that precisely raised the issue of insubordination or incompetency under the statute or any of the other provisions of 3012. However, I don't think that the Article 78 procedure is an answer to the problem that you raised, precisely for the reasons of the questions that you raised, of what is being reviewed. The Article 78 procedure is a summary proceeding. The only thing that is before the

court is a challenge to arbitrary and capricious conduct of the Board of Education or the Commissioner of Education. It is a proceeding where it is done on the basis of affidavits. If we wanted to review the action, we would make allegations sometimes similar to those in this complaint. The court may or may not choose to hear any evidence with respect to what we have to offer or make the Board refute by presenting some evidence what we have alleged to be irregularities in the procedure, and I would also disagree with Mr. Crean that the record, as he refers to it, the transcript, is necessarily before the court on review. It is not always before the Commissioner on review, if that route is used. In any event, even if it is, it is irrelevant and immaterial that it is there because it is not binding on anybody. Once the panel has made its report and recommendations, the transcript of that hearing ceases to be of any force an effect. There is nothing in the statute that requires the Board to consider that

transcript, there is nothing that requires them to consider the report and recommendation, the statute only requires that they determine the matter and, as your Honor pointed out in the decision convening the three judge court, the talk makes it very clear that the panel decision and the transcript are not binding on the Board.

With respect to Judge Oakes' question regarding the Broderick case, I can understand the question that you raise, but I think that Broderick has to be looked at in the context of the facts and with respect also to the early portion of that decision, where the court eliminates the question of vagueness. I think that there is a presumption that had the court found vagueness there, the question of overbreadth would not have been considered or if it had been considered, a different conclusion may have been reached. I think there the facts also are significant because, as the Court knows, there was no question of the language of the statute and what it meant, it was in

language which was readily understandable, and about which men could not differ as to their meaning. Here we are dealing with a statute when we are dealing with 3012 that does not necessarily lend itself to that. The question is what is insubordination? Shouldn't the parties subject to the statute have some forewarning of what kind of conduct may subject them to being considered insubordinate? What is conduct unbecoming a teacher? There is presently in the federal forums considerable cases, some of which we have cited in our briefs, which are dealing with these questions. There is a case out of the district court in Washington dealing with the question of immorality, and that case reflects how the bland word "immorality" can be misconstrued and be of questionable validity. Kennedy v Sanchez raises the question of what is meant by "in the good and efficiency of the service."

JUDGE OAKES: I think the thrust of my point, if you will, about Broderick is that where conduct is clearly hard core violating conduct, under any circumstances would

be considered --

MR. ASHE: Your Honor, I think that Broderick says that it is hard core because the statute is not vague.

JUDGE OAKES: I see your point.

MR. ASHE: I think that is the distinction that has to be made between Broderick and this particular case.

To go back to the question of the Board meeting, and what the Board considers in making its determination as to whether it will or will not dismiss or otherwise discipline a teacher under 3020(a), I would just like to suggest to the Court that the general practice in this state, as we have found it to be, that where the Board is considering these kinds of personnel matters, they do so in executive session, and that executive session is limited to persons it invites to that executive session. We have no way of knowing what is considered in that executive session. They may consider the file of the individual, the personnel file of the individual, they may consider any other extraneous sources of

information. We have no way of determining that. I have to reiterate Mr. Sandner's representation with respect to the question of good faith here. I think the facts of this case raise a question of doubt of the good faith of the district in the action that it took, as to whether it is or is not impartial.

Finally, with respect to the question of suspension, I would not feel comfortable with a mere representation by counsel that the Board will not take any action suspending the plaintiff in this action. I think the Court will readily understand that counsel does not always have control of what his client may do, and I would not feel that my client's interests would be adequately protected--

JUDGE HENDERSON: Up here in Erie County they do. We pretty much take the word of the lawyers, they've got control.

MR. ASHE: That has not been my experience in all counties of the state, nor in Albany, for that matter. I would not feel comfortable that Mr. Kinsella -- the

threat to Mr. Kinsella of suspension -- would be adequately protected without an order from this Court restraining the Board from doing so until such time as the Court has made its determination, and I would request that the Court either continue the stay that is in effect or issue a preliminary injunction at this time.

MR. McASKILL: In view of that last remark, does that mean that I don't have to make a phone call?

JUDGE OAKES: I guess it does because we are going to continue the stay. We thank you, gentlemen, for a very capable presentations on the part of each of you. We will reserve decision and --

JUDGE HENDERSON: One thing, Judge, before you close, as to that Mungerson affidavit, Mr. Sandner, when you get a chance, look at it in three or four days and either make such reply as you please or write us all a letter that you do not wish to reply, will you do that?

MR. SANDNER: I will, your Honor.

JUDGE HENDERSON: I want to echo what Judge Oakes said, I thought you were all well prepared.

I enjoyed the argument, and it certainly showed the result of some study, gentlemen, and I appreciate it.

* * * * * *

I hereby certify that this record is a true and accurate transcript from my stenographic notes in the proceedings.

Official Reporter
U. S. District Court

H. T. NOEL
OFFICIAL REPORTER, U.S. DISTRICT COURT

DECISION OF THREE JUDGE FEDERAL PANEL GRANTED AND ENTERED FEBRUARY 19, 1974 AS AMENDED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff

-vs-

CIVIL 1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants

Before OAKES, Circuit Judge, HENDERSON, Chief District Judge, and CURTIN, District Judge.

APPEARANCES: BERNARD F. ASHE, ESQ. and JAMES R. SANDNER, ESQ., Albany, New York, for Plaintiff.

GOLDEN, DAMON, MOREY, SAWYER & MOOT (JAMES S. McASKILL, ESQ., of Counsel), Buffalo, New York; THOMAS L. DAVID, ESQ., Buffalo, New York, for Defendant Central School District No. 7.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (DOUGLAS S. CREAM, ESQ., Assistant Attorney General, of Counsel), for Defendant Nyquist.

HENDERSON, Chief District Judge:

The plaintiff in this action is a tenured school teacher who has been employed by the defendant school board as a physical education and health education instructor for the past fourteen years. On March 1, 1973 the principal of the Senior High School of Sweet Home Central School District, where plaintiff is employed, filed charges against plaintiff

with the defendant school board pursuant to provisions of section 3020-a-1 of the Education Law of the State of New York. Those charges allege that on three separate occasions the plaintiff administered excessive corporal punishment to high school students. On March 5, 1973 the school board, acting pursuant to the same statute, made a finding that probable cause existed to support the charges. Plaintiff was notified in writing of the charges and of his right to a hearing before a three-member panel. Plaintiff requested that such a hearing be held, but prior thereto he filed this action, praying for a judgment declaring sections 3012 and 3020-a of the Education Law unconstitutional. Since plaintiff further seeks a permanent injunction against the operation of the above statutes, a three-judge panel was convened to hear argument.

Plaintiff's challenge to the constitutionality of section 3012 is based upon a claim of vagueness and over-breadth. With respect to section 3020-a plaintiff contends that the procedures set forth therein for the removal of a tenured teacher constitute a deprivation of property without due process, a violation of the equal protection clause, and potential infringement of a teacher's First Amendment rights. The court finds the equal protection and First Amendment claims to be improperly raised in this litigation.[1] The plaintiff's remaining contentions will be discussed in turn, together with the question of this court's abstention, which was raised initially at oral argument.

ABSTENTION

In a proper case for abstention, the uncertainty in state law must be such that construction of the statute by a state court might obviate the need for decision of a federal constitutional question. Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); Zwickler v. Koota, 389 U.S. 241, 248-49 (1967).

The Supreme Court has repeatedly emphasized that abstention should not be ordered merely to give the state courts the first opportunity to decide constitutional issues. It has also cautioned that abstention frequently leads to piecemeal adjudication in many courts, which will cause an undue delay of the ultimate decision on the merits. Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964).

With these guidelines in mind, we conclude that the instant case is not an appropriate one for abstention. The facts of this case do not raise questions of ambiguity in the state statute which the state courts might resolve in a way that would end the constitutional controversy. Wisconsin v. Constantineau, 400 U.S. 433, at 439 (1971). Nor is this a case where principles of comity would require abstention in the face of a pending state court proceeding. Lake Carriers Association v. MacMullan, 406 U.S. 498 at 509 (1972).

VAGUENESS AND OVERBREADTH

Section 3012 of the Education Law provides:

"2. . . . Such persons, [teachers appointed to tenure] and all others employed in the

> teaching service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; (c) failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. . . ." (Emphasis added.)

Plaintiff contends that the underscored language is both unconstitutionally vague and overbroad in that it fails to set forth guidelines for its application, either in other statutes or in the rules or regulations of either defendant, citing Connally v. General Construction Co., 269 U.S. 385 (1926). We find this contention without merit. Whatever may be the outer limits of the statutory language in question, that uncertainty has little relevance where the conduct alleged falls squarely within the hard core of conduct the statute was designed to proscribe. Broadrick v. State of Oklahoma, 41 U.S.L.W. 5111 (U.S. June 25, 1973). The charges filed against the plaintiff in this case constitute conduct which, if proven, would fall squarely within the statutory language set forth above.

DUE PROCESS

Section 3020-a of the Education Law provides the administrative machinery for processing charges against a tenured teacher.[2] Such charges must be filed in writing with

the clerk of the employing school district. Within five days of the date the school board is notified of the charges, the board, meeting in executive session, determines by majority vote whether probable cause exists to support the charges. If a probable cause finding is made, a written statement of the charges is sent to the teacher. The teacher may then elect to have a hearing before a three-member panel selected from a list maintained by the Commissioner of Education, and presided over by a hearing officer selected by the commissioner. At such a hearing the rules of evidence do not apply, but the teacher may be represented by counsel, may testify in his own behalf, and may subpoena and cross-examine witnesses. A verbatim record of the hearing is kept, transcribed and furnished to the teacher without charge. Following the hearing, the panel forwards its report and the transcripts of the proceedings to the commissioner. The Commissioner of Education then forwards to the employing board a hearing report setting forth the findings and recommendations of the hearing panel, including any recommendation as to penalty. The statute states that within thirty days of receipt of the hearing report, the employing board "shall determine the case by a vote of a majority of all members of such board and fix a penalty or punishment, if any . . ."

The plaintiff contends that the procedures set forth in section 3020-a constitute a denial of due process in that (1) a teacher is denied a meaningful hearing of his case because he is not permitted to present favorable evidence or to

rebut adverse evidence before the body that has the power to decide the case, that is, the school board; (2) the same attorney who represents the school board at the time of the probable cause finding will act as "prosecuting attorney" before the hearing panel in his capacity as attorney for the school principal who brought the charges, and will continue to act as attorney for the school board and presumably render advice to that board, at the time the case is finally determined; (3) the same body that makes the finding that probable cause exists to support the charge filed against a teacher will ultimately make the final decision of guilt or non-guilt and will decide upon a penalty; (4) a teacher may be suspended from his duties prior to any hearing.[3]

Any consideration of the procedures required by the due process clause, under a given set of circumstances, must begin with the question of whether the plaintiff may be deprived of "liberty" or "property" within the meaning of the due process clause as a result of those procedures. Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961).

In two recent decisions, Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court provided guidance as to which interests of government employees are constitutionally protected. Taken together, those cases establish that a tenured teacher has a property interest in continued employment in the absence of "sufficient cause" for dismissal. Perry v. Sindermann, supra at 601-03.

Since we are faced with a possible deprivation of a protected property interest, the ultimate question to be decided is whether the procedures mandated by section 3020-a comply with the requirements of due process.[4]

The crux of the plaintiff's due process claim is a challenge to the procedures involved in the final determination of the employing board which follows the hearing panel stage of the proceedings. The plaintiff contends that while section 3020-a provides for a hearing that conforms to due process standards, the right to a hearing is illusory because nothing that occurs before the hearing panel need have any impact on the school board's final determination.

Section 3020-a has been construed to mean that the findings and recommendations of the hearing panel are merely advisory and not in any way conclusive upon the employing board. LeTarte v. Board of Education, 65 Misc. 2d 147, 316 N.Y.S. 2d 781 (1970). The statute does not require that the school Board's decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceedings even be sent to the school board, although it has been represented at oral argument that the school board may, if it so desires, order the transcript. While the school board does receive a hearing report which contains the findings and recommendations of the panel, that report does not contain even a summary of the evidence elicited at the hearing.

Not only does the procedure outlined above fail to insure that the school board's decision will be based on evidence elicited at the hearing, it provides no safeguard against the school board's basing that decision on ex parte evidence. Furthermore, the problem is exacerbated by the fact that the school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision. The situation is analogous to that faced by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970) involving the termination of welfare benefits. The standards set forth in that decision are applicable here:

> "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and on evidence adduced at the hearing. (Citations omitted.) To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on. . . ." (Citations omitted.) Id. at 271.

In support of the constitutionality of the statute, the defendants contend that section 3020-a-5 affords the teacher the opportunity to appeal to New York Supreme Court in a special proceeding brought under Article 78 of the New York Civil Practice Law and Rules. The defendants contend that this provision would require the state court to review the school board's decision in light of the facts elicited at the hearing before the hearing panel.

This court finds that an appeal under Article 78 of the New York CPLR cannot correct the constitutional defects of section 3020-a. Since the school board is not required to

set forth reasons in support of its decision, a review of the factual determination relied upon by the board becomes illusory. Simply stated, there will not be an adequate record for a state court to review. See, United States v. Merz, 376 U.S.192 (1964).

The remaining contentions of the plaintiff need not detain us. The plaintiff sees a due process violation in the multiple roles played by both the school board itself and the board's attorney who also represents the school principal before the hearing panel. The affidavit of the school board attorney makes it clear that he never intended to counsel the school board as to its determination in the event this case proceeded to that point. Moreover, the Supreme Court has indicated the performing of multiple functions by individuals or groups in administrative processes is not per se a due process violation. Richardson v. Perales, 402 U.S. 389 410 (1971). See also, Marcello v. Bonds, 349 U.S. 302 (1965).

For the foregoing reasons we declare that § 3020-a of the Education Law of the State of New York, absent administrative regulations requiring decision to be based upon evidence elicited before the hearing panel and the decision of the Board to set forth the reasons and factual basis therefor, is unconstitutional, and the defendants are enjoined from its enforcement until such time as appropriate administrative or legislative action is taken to remedy the defects in the procedures here involved.

*Original text read "...§ 302-a..." Amended by order dated and entered February 19, 1974 to read "...§ 3020-a..."

It is so ordered.

/s/ James L. Oakes
U.S.C.J.

/s/ John O. Henderson
U.S.D.J.

/s/ John T. Curtin
U.S.D.J.

DATED: February 19, 1974

FOOTNOTES

1 Plaintiff's status as a tenured teacher does not give him standing to raise the argument that, since the procedures of section 3020-a are available only to tenured teachers, the statute discriminates against non-tenured teachers. His claim that section 3020-a could be used to chill the First Amendment rights of teachers is without merit, since the undisputed facts of this case raise no question of an infringement of First Amendment rights.

2 § 3020-a. Hearing procedures and penalties.

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desired a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a

vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of

education for such purposes: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

3 While we need not reach the question of suspension here since the plaintiff has not in fact been suspended, we note the rather surprising recent decision in Jerry v. Board of Education, 347 N.Y.S.2d 917 (Sup. Ct. 1973), permitting suspension of a tenured teacher without pay on the basis of charges that, if proved, would warrant dismissal.

4 We note that the Supreme Court has recently, 42 U.S.L.W. 3281 (U.S. Nov. 18, 1973), heard argument in Kennedy v. Sanchez, 349 F. Supp. 863 (N.D. Ill. 1972), prob. juris. noted sub. nom. Phillips v. Kennedy, 411 U.S. 915 (1973), a case in which a three-judge court held certain portions of the Lloyd-Lafollette Act, 5 U.S.C. §7501, relating to discharge procedures applicable to federal competitive service employees, to be unconstitutional. Since the provisions of § 3020-a resemble, in some respects, those of 5 U.S.C. § 7501, our decision here will have to be applied with deference to the Court's decision when handed down.

NOTICE OF MOTION AND MOTION FOR SUPPLEMENTARY RELIEF (MOTION I)

FILE COPY
NO. 326-L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

vs.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

CIVIL 1973-187

NOTICE OF MOTION AND MOTION FOR SUPPLEMENTARY RELIEF PURSUANT TO 28 USC §2202

PLEASE TAKE NOTICE, that the undersigned will bring the motion set forth below for declaratory, injunctive, coercive and other relief before Part I, United States District Court for the Western District of New York at the United States Courthouse in the City of Buffalo, New York on the 9th day of December, 1974 at eleven o'clock in the morning or as soon thereafter as counsel can be heard.

PLEASE TAKE FURTHER NOTICE, that the motion requests the re-convening of a three judge court if in this Court's discretion such is deemed necessary to consider the relief sought herein.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 8 (d) Federal Rules of Civil Procedure, 28 USC, opposing affidavits, if any, may be served not later than one day before the hearing of this motion.

MOTION FOR SUPPLEMENTARY RELIEF

Plaintiff, Donald M. Kinsella, moves this court pursuant to 28 USC §2202 and based upon:

1. the prior pleadings and proceedings in this matter,

2. the order signed by the Hon. James L. Oakes, the Hon. John O. Henderson, and the Hon. John. T. Curtin dated February 19, 1974.

3. the amendment order signed by the Hon. John T. Curtin dated February 20, 1974, and

4. the affidavit of Bernard F. Ashe, Esq. sworn to on November 21, 1974 for an order granting the following relief:

a. The reconvening of the three judge federal panel pursuant to 28 USC 2281 and 2284 to hear and determine this proceeding, if necessary.

b. A declaration that the actions taken by the Commissioner of Education and the Regents of the State of New York subsequent to the issuance of the order dated February 19, 1974 are null, void and of no effect and an order vacating the said rules and regulations referred to in this motion.

c. Appropriate injunctive and coercive relief in order to effectuate the decision of this court.

d. Such other further and different relief as this court may deem just.

DATED: November 22, 1974

Bernard F. Ashe

BERNARD F. ASHE, ESQ.
JAMES R. SANDNER, ESQ.
Attorneys for the Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

TO: OHLIN, DAMON, MOREY, SAWYER & MOOT, ESQ.
(James S. McAskill, Esq., of Counsel)
THOMAS L. DAVID, ESQ.
Attorneys for Defendant School District
LOUIS J. LEFKOWITZ, ESQ.
(Douglas S. Cream, Esq., of Counsel)
Attorney for Defendant Commissioner

AFFIDAVIT OF BERNARD F. ASHE, ESQ.
IN SUPPORT OF MOTION DATED NOVEMBER 22, 1974

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA, Plaintiff, vs. BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, Defendants.	CIVIL 1973-187 AFFIDAVIT

BERNARD F. ASHE, being duly sworn, deposes and says:

1. I am an attorney and counselor at law, duly licensed to practice in the State of New York, and I am also admitted to practice before the United States District Court for the Western District of New York.

2. That I am the attorney of record for Donald M. Kinsella, the plaintiff in this action. I have an office for the practice of law at 80 Wolf Road, Albany, New York 12205.

3. An order signed by the Hon. James L. Oakes, United States Circuit Judge, the Hon. John O. Henderson, United States District Judge, and the Hon. John T. Curtin, United States District Judge was granted and entered on February 19, 1974. A copy of that order is annexed as Exhibit A, and is reported at 378 Fed. Supp. 54.

4. That the decision of the three judge court, not having been appealed, is final and binding on all of the parties.

5. That as amended by the corrective order of February 20, 1974, the final paragraph of the order of February 19, 1974, reads as follows:

> "For the foregoing reasons we declare that §3020-a of the Education Law of the State of New York, absent administrative regulations requiring decision to be based upon evidence elicited before the hearing panel and the decision of the Board to set forth the reasons and factual basis therefor, is unconstitutional, and the defendants are enjoined from its enforcement until such time as appropriate administrative or legislative action is taken to remedy the defects in the procedures here involved."

6. That as a consequence of the above mentioned order, your deponent caused a letter to be prepared and mailed to the Commissioner of Education of the State of New York. A copy of that letter is annexed hereto as Exhibit B.

7. In that letter, your deponent stated his opinion that the decision of the three judge federal panel mentioned above required the Commissioner of Education to terminate all tenure hearings then in progress and which had been commenced throughout the State of New York pursuant to Education Law §3020-a.

8. Upon information and belief, William Bellas, Esq. the hearing officer in the matter, was made aware of the decision of the three judge federal court.

9. Shortly after the order of this court was handed down, the Commissioner of Education of the State of New York halted all tenure hearings which had been commenced pursuant to §3020-a of the Education Law of the State of New York, as more fully appears in the notice annexed hereto as Exhibit C.

10. Upon information and belief, prior to February 28, 1974, there existed no rule or regulation of either the Commissioner of Education or the Board of Regents of the State of New York, which affected "post-hearing procedures" with respect to proceedings brought pursuant to New York State Education Law §3020-a.

11. Upon information and belief, on or about February 28, 1974 the Regents of the University of the State of New York approved the adoption of new rules and regulations for the Commissioner of Education of the State of New York. A copy of the rules and regulations adopted by the Regents of the State of New York on February 28, 1974 is annexed hereto as Exhibit D.

12. Upon information and belief there are appropriate New York State constitutional provisions and statutes which provide for adoption of rules and regulations by the Commissioner of Education.

13. Upon information and belief, Exhibit D is an immediate and direct result of the order of the three judge court annexed as Exhibit A.

14. The rules and regulations contained in Exhibit D are an unlawful and an invalid exercise of power by the Commissioner of Education and/or the Regents of the State of New York and amount to an attempt to subvert, bypass, nullify and render void the decision of this court contained in Exhibit A.

15. That the rules and regulations contained in Exhibit D were conceived exclusively by the Commissioner of Education, his representatives, agents, servants or employees.

16. Upon information and belief the Commissioner of Education is the agent of the Board of Regents of the State of New York.

17. Upon information and belief the adoption of the substantance of Exhibit D by the Regents was wholly at the instance and request of the Commissioner, his representatives, agents, servants or employees.

18. The laws of the State of New York require that certain conditions percedent be fulfilled prior to the effective date of any rules or regulations promulgated or adopted by the Commissioner of Education and/or Regents.

19. That pursuant to the above mentioned statutes, no rule or regulation is valid unless submitted to the temporary president of the Senate and the Speaker of the Assembly at least twenty days prior to the adoption of such rule.

20. Upon information and belief, the rules and regulations of the Commissioner of Education adopted on February 28, 1974 were not submitted to either the temporary President of the Senate or the Speaker of the Assembly at any time prior to their effective date, which was also February 28, 1974.

21. Upon information and belief, the said rules and regulations were not adopted as emergency measures in accordance with Paragraph 3 of §101-a of the Executive Law of the State of New York.

22. Upon information and belief, there is no exemption

provided for the rules and regulations contained in Exhibit D in any statute or the New York State Constitution.

23. Upon information and belief, Exhibit D adopted as hereinabove mentioned was filed with the Secretary of State of the State of New York pursuant to Paragraph 2, §102 of the Executive Law of the State of New York on February 28, 1974 to be effective on that date.

24. Upon information and belief, neither the Regents of the State of New York nor the Commissioner of Education of the State of New York conferred with or obtained approval from the Secretary of State with respect to Exhibit D as required by §105 of the Executive Law of the State of New York.

25. Upon information and belief, neither the Regents of the State of New York nor the Commissioner of Education of the State of New York had any authority by way of constitution or statute to adopt any or all of the rules and regulations purportedly adopted on February 28, 1974.

26. Upon information and belief, neither the Regents of the State of New York nor the Commissioner of Education of the State of New York properly adopted the rules and regulations purportedly adopted on February 28, 1974.

27. Upon information and belief, thereafter, and in reliance upon the illegal and unlawful rules and regulations purportedly adopted on February 28, 1974, the Commissioner of Education, his representatives, agents, servants or employees, mailed or caused

to be mailed copies of the purported regulations adopted on February 28, 1974 to William Bellas, Esq., the hearing officer in the tenure hearing against Donald Kinsella.

28. In addition, the Commissioner of Education, through his agents and employees notified the participants in the tenure hearing that such tenure hearing would now continue by reason of the action taken in adopting the rules and regulations of February 28, 1974. A copy of the notice containing the information set forth in this and the prior paragraph is annexed hereto as Exhibit E.

29. That pursuant to this notice, William Bellas, Esq., ordered the said hearing in which the plaintiff herein, Donald M. Kinsella is a defendant, to continue as more fully appears in Exhibit F.

30. As more fully appears in the Panel Report, a copy of which is annexed as Exhibit G and the Board of Education Determination, a copy of which is annexed hereto as Exhibit H, the tenure hearing has proceeded to conclusion, pursuant to New York State Education Law §3020-a.

31. That the action taken by the Commissioner of Education in promulgating rules and regulations is a purported attempt to rehabilitate the statute this court found unconstitutional illegal, unlawful, ultra vires, null and void and of no effect.

32. The legislature of the State of New York has not amended Education Law §3020-a since this court rendered its decision in Exhibit A.

33. That this court has continuing jurisdiction over the parties and subject matter and has the power to review New York State Education Law §3020-a as rehabilitated by the rules and regulations of the Commissioner of Education.

34. That since the rules and regulations are illegal, the statute remains verbatim as it was when construed by this court and therefore remains unconstitutional.

BY REASON OF THE ABOVE, this court is respectfully requested to grant the relief sought in the Motion to which this is annexed.

Dated: November 22, 1974

Bernard F. Ashe
BERNARD F. ASHE, ESQ.

Sworn to before me this 22nd
day of November, 1974.

Ira Paul Rubtchinsky
Notary Public

IRA PAUL RUBTCHINSKY
NOTARY PUBLIC, State of N. Y. Albany County
My Commission Expires March 30, 19.....

EXHIBIT A ANNEXED TO AFFIDAVIT REPORTED TEXT OF THE THREE JUDGE PANEL DECISION

charges brought against the teacher by the principal sought declaratory and injunctive relief upon the contention that certain sections of the New York Education Law were unconstitutional. A three-judge panel, John O. Henderson, Chief District Judge, held that a New York statute providing procedure for action by the school board upon charges of teacher misconduct was violative of due process, in the absence of administrative regulations, in failing to insure that the board's decision would be based on evidence elicited at the hearing before the hearing panel and in providing no safeguard against the board's basing its decision on ex parte evidence, particularly in view of the fact that the board was not required to render written decisions setting forth its reasoning and a factual basis for its decision.

One section of Education Law declared unconstitutional, and defendants enjoined.



Donald M. KINSELLA, Plaintiff,

v.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF the TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and Ewald B. Nyquist, Commissioner of Education of the State of New York, Defendants.

Civ. No. 1973-187.

United States District Court, W. D. New York.

Feb. 19, 1974.

As Amended Feb. 20, 1974.

1. Constitutional Law ⇐42.3(3), 46(1)

Claims of denial of equal protection and First Amendment rights were improperly raised in suit by discharged teacher in that teacher's tenured status did not give him standing to raise argument that New York statute discriminated against nontenured teachers and in that undisputed facts of case raised no question of infringement of First Amendment rights under New York statute which teacher claimed could be used to chill First Amendment rights of teachers. Education Law N.Y. §§ 3012, 3020-a, 3020-a, subd. 1; U.S.C.A. Const. Amends. 1, 14.

A teacher notified by the school board that the board had made a finding that probable cause existed to support

5. The defendant admitted at the hearing on probation revocation that he had been driving without a valid license. We did not consider this as a basis for revocation because the government did not give notice to defendant that driving without a valid license would be considered as one of the grounds for revocation of probation.

6. In its motion to revoke probation the government charged the defendant with "fencing" checks. The government also outlined the facts underpinning its charge that the defendant "fenced" checks. These facts include both the possession of stolen Treasury checks knowing them to be stolen and the causing of the checks to be negotiated. The government's proof at the probation revocation hearing falls short of proving that defendant caused Treasury checks to be negotiated. We consider the notice given to the defendant in the government's motion to revoke probation sufficient, however, to apprise the defendant of the charge of possessing stolen Treasury checks knowing them to be stolen. On this charge the government has sustained its burden of proof.

EXHIBIT "A", page 1

2. Courts ⇐370(6)

To make proper case for abstention on ground of uncertainty in state law, uncertainty must be such that construction of statute by state court might obviate need for decision of federal constitutional question.

3. Courts ⇐280.4

Federal district court would not abstain from consideration of constitutionality of New York statute where facts of case did not raise questions of ambiguity in state statute which state courts could resolve in way which would end constitutional controversy and where there was not any pending state court proceeding by reason of which principles of comity might require abstention. Education Law N.Y. § 3020–a.

4. Statutes ⇐47

Teacher was not entitled to declaratory and injunctive relief on ground that state statute was unconstitutionally vague and overbroad where teacher's conduct fell squarely within hard core of conduct which the statute was designed to proscribe. Education Law N.Y. § 3012.

5. Constitutional Law ⇐255(1), 278(1)

Any consideration of procedures required by due process clause under given set of circumstances must begin with question whether plaintiff may be deprived of "liberty" or "property" within meaning of due process clause as result of such procedures. U.S.C.A.Const. Amend. 14.

6. Constitutional Law ⇐277(2)

Teacher's interest in continued employment was property interest within protection of procedural due process guarantees. U.S.C.A.Const. Amend. 14; Education Law N.Y. § 3020–a.

7. Schools and School Districts ⇐141(5)

Statute providing for hearing procedures and penalties with respect to teacher accused of misconduct did not require that school board's decision be based upon record developed before hearing panel, or even that transcript of hearing panel proceedings be sent to school board, but only that school board receive hearing report containing findings and recommendations of panel. Education Law N.Y. § 3020–a.

8. Constitutional Law ⇐318(2)
Schools and School Districts ⇐141(5)

New York statute providing procedure for action by school board upon charges of teacher misconduct was violative of due process, in absence of administrative regulations, in failing to insure that board's decision would be based on evidence elicited at hearing before hearing panel and in providing no safeguard against board's basing its decision on ex parte evidence, particularly in view of fact that board was not required to render written decisions setting forth its reasoning and factual basis for its decision. Education Law N.Y. § 3020–a; U.S.C.A.Const. Amend. 14.

9. Schools and School Districts ⇐141(5)

Statutory review proceeding could not correct constitutional defects of New York statute governing procedure of school board in acting upon charges of teacher misconduct. Education Law N. Y. § 3020–a; CPLR N.Y. 7801 et seq.

10. Constitutional Law ⇐318(1)

Performing of multiple functions by individuals or groups in administrative processes is not per se due process violation. U.S.C.A.Const. Amend. 14.

Bernard F. Ashe, and James R. Sandner, Albany, N. Y., for plaintiff.

Ohlin, Damon, Morey, Sawyer & Moot, Buffalo, N. Y. (James S. McAskill, Buffalo, N. Y., of counsel), Thomas L. David, Buffalo, N. Y., for Defendant Central School Dist. No. 7.

Louis J. Lefkowitz, Atty. Gen. of N. Y. (Douglas S. Cream, Asst. Atty. Gen., of counsel), for defendant Nyquist.

Before OAKES, Circuit Judge, HENDERSON, Chief District Judge, and CURTIN, District Judge.

JOHN O. HENDERSON, Chief District Judge:

The plaintiff in this action is a tenured school teacher who has been em-

EXHIBIT "A", page 2 162.

ployed by the defendant school board as a physical education and health education instructor for the past fourteen years. On March 1, 1973 the principal of the Senior High School of Sweet Home Central School District, where plaintiff is employed, filed charges against plaintiff with the defendant school board pursuant to provisions of section 3020–a subd. 1 of the Education Law of the State of New York. Those charges allege that on three separate occasions the plaintiff administered excessive corporal punishment to high school students. On March 5, 1973 the school board, acting pursuant to the same statute, made a finding that probable cause existed to support the charges. Plaintiff was notified in writing of the charges and of his right to a hearing before a three-member panel. Plaintiff requested that such a hearing be held, but prior thereto he filed this action, praying for a judgment declaring sections 3012 and 3020–a of the Education Law unconstitutional. Since plaintiff further seeks a permanent injunction against the operation of the above statutes, a three-judge panel was convened to hear argument.

[1] Plaintiff's challenge to the constitutionality of section 3012 is based upon a claim of vagueness and overbreadth. With respect to section 3020–a plaintiff contends that the procedures set forth therein for the removal of a tenured teacher constitute a deprivation of property without due process, a violation of the equal protection clause, and potential infringement of a teacher's First Amendment rights. The court finds the equal protection and First Amendment claims to be improperly raised in this litigation.[1] The plaintiff's remaining contentions will be discussed in turn, together with the question of this court's abstention, which was raised initially at oral argument.

ABSTENTION

[2] In a proper case for abstention, the uncertainty in state law must be such that construction of the statute by a state court might obviate the need for decision of a federal constitutional question. Railroad Commission v. Pullman Co., 312 U.S. 495, 61 S.Ct. 643, 85 L.Ed. 971 (1941); Zwickler v. Moota, 389 U.S. 241, 248–249, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

The Supreme Court has repeatedly emphasized that abstention should not be ordered merely to give the state courts the first opportunity to decide constitutional issues. It has also cautioned that abstention frequently leads to piecemeal adjudication in many courts, which will cause an undue delay of the ultimate decision on the merits. Baggett v. Bullitt, 377 U.S. 360, 378–379, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

[3] With these guidelines in mind, we conclude that the instant case is not an appropriate one for abstention. The facts of this case do not raise questions of ambiguity in the state statute which the state courts might resolve in a way that would end the constitutional controversy. Wisconsin v. Constantineau, 400 U.S. 433, at 439, 91 S.Ct. 507, 27 L.Ed. 2d 515 (1971). Nor is this a case where principles of comity would require abstention in the face of a pending state court proceeding. Lake Carriers Association v. MacMullan, 406 U.S. 498 at 509, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972).

VAGUENESS AND OVERBREADTH

Section 3012 of the Education Law provides:

"2. . . . Such persons, [teachers appointed to tenure] and all others employed in the teaching service of the schools of such union free school

1. Plaintiff's status as a tenured teacher does not give him standing to raise the argument that, since the procedures of section 3020–a are available only to tenured teachers, the statute discriminates against non-tenured teachers. His claim that section 3020–a could be used to chill the First Amendment rights of teachers is without merit, since the undisputed facts of this case raise no question of an infringement of First Amendment rights.

EXHIBIT "A", page 3 163.

district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing, *as provided by section three thousand twenty-a of such law:* (a) *insubordination, immoral character or conduct unbecoming a teacher;* (b) *inefficiency, incompetency, physical or mental disability, or neglect of duty;* (c) failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. . . . ." (Emphasis added.)

[4] Plaintiff contends that the italicized language is both unconstitutionally vague and overbroad in that it fails to set forth guidelines for its application, either in other statutes or in the rules or regulations of either defendant, citing Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). We find this contention without merit. Whatever may be the outer limits of the statutory language in question, that uncertainty has little relevance where the conduct alleged falls squarely within the hard core of conduct the statute was designed to proscribe. Frondrick v. State of Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The charges filed against the plaintiff in this case constitute conduct which, if proven, would fall squarely within the statutory language set forth above.

DUE PROCESS

Section 3020–a of the Education Law provides the administrative machinery for processing charges against a tenured teacher.[2] Such charges must be filed in

2. § 3020–a. *Hearing procedures and penalties.*
1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.
2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desired a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.
3. Hearings.
a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.
b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel

EXHIBIT "A", page 4

writing with the clerk of the employing school district. Within five days of the date the school board is notified of the charges, the board, meeting in executive session, determines by majority vote whether probable cause exists to support the charges. If a probable cause finding is made, a written statement of the charges is sent to the teacher. The teacher may then elect to have a hearing before a three-member panel selected from a list maintained by the Commissioner of Education, and presided over by a hearing officer selected by the commissioner. At such a hearing the rules of evidence do not apply, but the teacher may be represented by counsel, may testify in his own behalf, and may subpoena and cross-examine witnesses. A verbatim record of the hearing is kept, transcribed and furnished to the teacher without charge. Following the hearing, the panel forwards its report and the transcripts of the proceedings to the commissioner. The Commissioner of Education then forwards to the employing board a hearing report setting forth the findings and recommendations of the hearing panel, including any recommendation as to penalty. The statute states that within thirty days of receipt of the hearing report, the employing board "shall determine the case by a vote of a majority of all members of such board and fix a penalty or punishment, if any . . ."

The plaintiff contends that the procedures set forth in section 3020–a constitute a denial of due process in that (1) a teacher is denied a meaningful hear-

with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purposes: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

EXHIBIT "A", page 5 165.

ing of his case because he is not permitted to present favorable evidence or to rebut adverse evidence before the body that has the power to decide the case, that is, the school board; (2) the same attorney who represents the school board at the time of the probable cause finding will act as "prosecuting attorney" before the hearing panel in his capacity as attorney for the school principal who brought the charges, and will continue to act as attorney for the school board and presumably render advice to that board, at the time the case is finally determined; (3) the same body that makes the finding that probable cause exists to support the charge filed against a teacher will ultimately make the final decision of guilt or non-guilt and will decide upon a penalty; (4) a teacher may be suspended from his duties prior to any hearing.[3]

[5] Any consideration of the procedures required by the due process clause, under a given set of circumstances, must begin with the question of whether the plaintiff may be deprived of "liberty" or "property" within the meaning of the due process clause as a result of those procedures. Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

In two recent decisions, Board of Regents v. Roth, 408 U.S. 564, 93 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), the Supreme Court provided guidance as to which interests of government employees are constitutionally protected. Taken together, those cases establish that a tenured teacher has a property interest in continued employment in the absence of "sufficient cause" for dismissal. Perry v. Sindermann, *supra* at 601–603, 92 S.Ct. 2694.

[6] Since we are faced with a possible deprivation of a protected property interest, the ultimate question to be decided is whether the procedures mandated by section 3020–a comply with the requirements of due process.[4]

The crux of the plaintiff's due process claim is a challenge to the procedures involved in the final determination of the employing board which follows the hearing panel stage of the proceedings. The plaintiff contends that while section 3020–a provides for a hearing that conforms to due process standards, the right to a hearing is illusory because nothing that occurs before the hearing panel need have any impact on the school board's final determination.

[7] Section 3020–a has been construed to mean that the findings and recommendations of the hearing panel are merely advisory and not in any way conclusive upon the employing board. Le Tarte v. Board of Education, 65 Misc.2d 147, 316 N.Y.S.2d 781 (1970). The statute does not require that the school Board's decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceedings even be sent to the school board, although it has been represented

3. While we need not reach the question of suspension here since the plaintiff has not in fact been suspended, we note the rather surprising recent decision in Jerry v. Board of Education, 75 Misc.2d 461, 347 N.Y.S.2d 917 (Sup.Ct.1973), permitting suspension of a tenured teacher without pay on the basis of charges that, if proved, would warrant dismissal.

4. We note that the Supreme Court has recently, 42 U.S.L.W. 3281 (U.S. Nov. 18, 1973), heard argument in Kennedy v. Sanchez, 349 F.Supp. 863 (N.D.Ill.1972), prob. Juris. noted sub nom. Phillips v. Kennedy, 411 U.S. 915, 93 S.Ct. 1549, 36 L.Ed.2d 306 (1973), a case in which a three-judge court held certain portions of the Lloyd-Lafollette Act, 5 U.S.C. § 7501, relating to discharge procedures applicable to federal competitive service employees, to be unconstitutional. Since the provisions of § 3020–a resemble, in some respects, those of 5 U.S.C. § 7501, our decision here will have to be applied with deference to the Court's decision when handed down.

EXHIBIT "A", page 6 166.

at oral argument that the school board may, if it so desires, order the transcript. While the school board does receive a hearing report which contains the findings and recommendations of the panel, that report does not contain even a summary of the evidence elicited at the hearing.

[8] Not only does the procedure outlined above fail to insure that the school board's decision will be based on evidence elicited at the hearing, it provides no safeguard against the school board's basing that decision on ex parte evidence. Furthermore, the problem is exacerbated by the fact that the school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision. The situation is analogous to that faced by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) involving the termination of welfare benefits. The standards set forth in that decision are applicable here:

> "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and on evidence adduced at the hearing. (Citations omitted.) To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on. . . ." (Citations omitted.) *Id.* at 271, 90 S.Ct. at 1022.

[9] In support of the constitutionality of the statute, the defendants contend that section 3020–a, subd. 5 affords the teacher the opportunity to appeal to New York Supreme Court in a special proceeding brought under Article 78 of the New York Civil Practice Law and Rules. The defendants contend that this provision would require the state court to review the school board's decision in light of the facts elicited at the hearing before the hearing panel.

This court finds that an appeal under Article 78 of the New York CPLR cannot correct the constitutional defects of section 3020–a. Since the school board is not required to set forth reasons in support of its decision, a review of the factual determination relied upon by the board becomes illusory. Simply stated, there will not be an adequate record for a state court to review. See, United States v. Merz, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964).

[10] The remaining contentions of the plaintiff need not detain us. The plaintiff sees a due process violation in the multiple roles played by both the school board itself and the board's attorney who also represents the school principal before the hearing panel. The affidavit of the school board attorney makes it clear that he never intended to counsel the school board as to its determination in the event this case proceeded to that point. Moreover, the Supreme Court has indicated the performing of multiple functions by individuals or groups in administrative processes is not per se a due process violation. Richardson v. Perales, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). See also, Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1965).

For the foregoing reasons we declare that § 3020–a of the Education Law of the State of New York, absent administrative regulations requiring decision to be based upon evidence elicited before the hearing panel and the decision of the Board to set forth the reasons and factual basis therefor, is unconstitutional, and the defendants are enjoined from its enforcement until such time as appropriate administrative or legislative action is taken to remedy the defects in the procedures here involved.

It is so ordered.

EXHIBIT "A", page 1 167.

EXHIBIT B ANNEXED TO AFFIDAVIT
LETTER DATED FEBRUARY 20, 1974

February 20, 1974

Ewald B. Nyquist
Commissioner of Education
State Education Department
State Education Building
Albany, New York 12224

Re: Donald M. Kinsella v. Board of Education of Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County and Ewald B. Nyquist, Commissioner of Education of the State of New York; Civil No. 1973-187 (Our File No. 326-L)

Dear Commissioner Nyquist:

Enclosed you will find a certified copy of the decision of the three-judge Federal District Court for the Western District of New York in the above-entitled matter. The court's decision declares unconstitutional §3020-a of the Education Law of the State of New York. The court further enjoins the enforcement of that statute until "such time as appropriate administrative or legislative action is taken to remedy the defects in the procedures herein involved."

As you are certainly aware, there are presently pending within the State, at various stages, a number of proceedings initiated pursuant to §3020-a. It is our position that the enclosed decision requires those proceedings to be terminated immediately and the teachers involved in those proceedings reinstated with back pay.

The purpose of this letter is to formally request that your office instruct all appropriate divisions of your department, all hearing officers presiding over 3020-a proceedings, all panel members presently considering decisions in such proceedings and all school boards which have initiated such proceedings that

the statute under which such proceedings were initiated is unconstitutional and that such proceedings must be terminated with the teachers against whom charges are being pursued in such proceedings being entitled to immediate full reinstatement and back pay to the position held prior to the initiation of such charges.

Needless to say, we are sure that the decision precludes the Commissioner, who was a party to the above proceeding, from initiating or permitting the initiation of any further proceedings pursuant to §3020-a of the Education Law.

Very truly yours,

BERNARD F. ASHE

BFA/rpn
Enc.

cc: Robert D. Stone, Esq.
w/enc. Office of Counsel
State Education Department
State Education Building
Albany, New York 12224

w/enc. Eugene Kaufman, Esq.
Co-General Counsel
New York State United Teachers, Inc.
260 Park Avenue South
New York, New York 10010

EXHIBIT B page 2

THE STATE EDUCATION DEPARTMENT
99 WASHINGTON AVENUE
ALBANY, NEW YORK 12210

EXHIBIT C ANNEXED TO AFFIDAVIT
PRINCIPAL PARTICIPANT LIST

OFFICE OF SCHOOL DISTRICT EMPLOYEE EMPLOYEE RELATIONS
518 474-7...

To: Those named below

Date: February 22, 1974

From: Watson I. Goodrich, Jr.

Subject: Section 3020A Education Law - Teacher Tenure Hearing
Principal Participant List

NOTICE: THIS HEARING HAS BEEN POSTPONED INDEFINETLY: YOU WILL BE CONTACTED BY OUR OFFICE OF A NEW DATE WHEN IT IS ESTABLISHED

School District Sweet Home CSD #7, 1901 Sweet Home Road, Buffalo, New York 14221

Clerk C. Leon Smith Address Above Phone: 716: 683-9678

Complainant Dr. James M. Haught, Principal Sr. High School Address Above 716: 688-368
Thomas L. David, Esq. 716: 854-4...
Represented by Gross, Shuman, Wiltse and Laub, 1410 Liberty Bank Bldg., Buffalo, N.Y.

Defendant-Tenured Teacher Donald M. Kinsella, 1266 Ellicott Creek Road, Tonawanda, N.Y.
James Sandner, Esq., Asst. General Counsel 518: 459-5400 X2
Represented by New York State United Teachers, 80 Wolf Road, Albany, N.Y. 12205
William P. Bellas, Esq., Stahacos & Bellas
Hearing Officer 17 Court Street, Buffalo, N.Y. 14202 716: 853-6130
Elmer Cone Baker 716: 856-2328
Court Reporter Court Reporter, 678 Ellicott Square Building, Buffalo, N.Y. 14203
Donald W. Munson, Amherst Central Sr. H.S. 716: 836-1220
Board Panel Member 4301 Main Street, Amherst, N.Y. 14226 Res. Phone - 716: 634-6446
Ronald Uba, Williamsville Office: 716: 634-7132
Employee Panel Member Res: 68 East Depew Street, Buffalo, N.Y. 14214 716:835-5064
Dr. Herman J. Bowman, East Aurora Schools 716: 652-1000
3rd Panel Member Res: 16 Kathryn Drive, Orchard Park, N.Y. 14127 716: 662-4755

Date and Time of Hearing ~~Tuesday, April 10, 1973 10:00 a.m.~~

Place of Hearing Charter Oaks Recreation Room, 5 Bristol Drive (off Skinnersville Rd.)
Williamsville, New York 14221

If above information is incomplete, additional notices will be forwarded as soon a information is available.

Copies sent to: All Persons Listed Above

EXHIBIT C

EXHIBIT D ANNEXED TO AFFIDAVIT
AMENDMENTS TO THE REGULATIONS

AMENDMENT TO REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Section 3020-a of the Education Law

1. Subdivision (h) of section 82.10 of the Regulations of the Commissioner of Education is amended, effective February 28, 1974, as follows:

(h) The findings of the panel on each charge, and the recommendations of the panel as to disciplinary action, if any, against the employee shall be submitted to the hearing officer, together with the panel members' copies of the transcript, no later than the adjourned date of the hearing. Upon receipt of such findings and recommendations, the hearing officer shall declare the hearing concluded, and shall forward the findings and recommendations, together with the three copies of the transcript, to the commissioner. The commissioner shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to the penalty if one is warranted, together with a copy of the transcript of the proceedings before the hearing panel to the employee and to the clerk of the employing board.

2. The Regulations of the Commissioner of Education are amended, effective February 28, 1974, by the addition of a new section 82.11 to read as follows:

Section 82.11 Decision of the board. The decision of the board of education shall be based solely upon the record in the proceedings before the hearing panel, and shall set forth the reasons and the factual basis for the determination.

EXHIBIT E ANNEXED TO AFFIDAVIT
MEMO DATED MARCH 5, 1974

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
99 WASHINGTON AVENUE
ALBANY, NEW YORK 12210

ASSOCIATE COMMISSIONER FOR EDUCATIONAL FINANCE AND MANAGEMENT SERVICES

ASSISTANT COMMISSIONER FOR EDUCATIONAL FINANCE AND MANAGEMENT SERVICES

OFFICE OF SCHOOL DISTRICT EMPLOYER-EMPLOYEE RELATIONS
518 474-7842

March 5, 1974

TO: Participants in pending proceedings under Education Law Section 3020-a

FROM: Vito F. Longo

SUBJECT: Resumption of proceedings

As you know, the proceeding upon charges brought against a tenured school district employee in which you are a participant was temporarily adjourned.

On February 19, 1974, a three-judge Federal Court held that section 3020-a of the Education Law in unconstitutional, absent administrative regulations requiring the decision of a board of education to be based upon evidence elicited before the hearing panel, and requiring such decision to be in writing setting forth the reasons and the factual basis therefor (Kinsella v. Board of Education of Central School District No. 7, Towns of Amherst and Tonawanda, Erie County, and Nyquist, U.S. District Court, Western District of New York, Civil 1973-187).

On February 28, 1974, the Board of Regents approved an amendment of subdivision (h) of section 82.10 and the addition of a new section 82.11 of the Regulations of the Commissioner of Education, which were effective February 28, 1974. This amendment and addition, a copy of which is attached, make three changes in the presently required procedures under section 3020-a and Part 82 of the Regulations of the Commissioner of Education:

1. the board of education shall be provided with a transcript of the proceedings before the hearing panel.

2. the board shall be required to render a written decision, setting forth the reasons and the factual basis for its determination.

3. such determination of the board shall be based solely upon the record in the proceedings before the hearing panel.

The Counsel for the Department has advised my Office that the decision of the Court in Kinsella does not require the termination of any currently pending proceeding under the provisions of section 3020-a of the Education Law. The hearing officer in the matter in which you are participating will be contacting you shortly with respect to further proceedings.

VFL:jw
Attachment

EXHIBIT E page 2

EXHIBIT F ANNEXED TO AFFIDAVIT
MEMO DATED MARCH 13, 1974

STATHACOS & BELLAS
ATTORNEYS AND COUNSELLORS AT LAW

SEVENTEEN COURT STREET
BUFFALO, NEW YORK 14202
CABLE: STAWYBELL
853-6180

March 13, 1974

DOCKET 3/18
DIARY
FILE 292-

TO: Mr. Smith, Dr. Haught, Mr. David, Mr. Kinsella, Mr. Sander, Mr. Baker, Mr. Munson, Mr. Uba, Dr. Bowman and Mr. Goodrich

FROM: William P. Bellas, Esq.

Re: Rescheduling of Teacher Tenure Hearing in the matter of Sweet Home Central School -vs- Donald M. Kinsella

Please be advised that William P. Bellas, Esq. Hearing Office in the above referred to teacher tenure hearing, has rescheduled the hearing to begin on Wednesday, March 27, 1974 at 10:00 a.m. in the Charter Oaks Recreation Room, 5 Bristol Drive, Williamsville, New York. In the event an additional day is required to conclude said hearing, the day of March 28, 1974 should be set aside.

Should you have any questions, please contact me.

By William P. Bellas
William P. Bellas

WPB:ms

EXHIBIT F

EXHIBIT G ANNEXED TO AFFIDAVIT
PANEL REPORT

Sweet Home Central School District #7

-vs- Donald M. Kinsella

PANEL REPORT

Members of the panel, having heard the charges preferred against Donald M. Kinsella by the Board of Education, Sweet Home Central School District No. 7, have determined that sufficient evidence was presented to show that Mr. Kinsella has demonstrated behaviors of extreme over reaction to relatively "ordinary" acts of misconduct by students, reactions which were wholly unnecessary and unbecoming a teacher. These intense outbursts have occurred within the past few years with the latest, the Steven Ulmer incident, by far the most physically severe and potentially harmful. The fact that this incident occurred after Mr. Kinsella had been suspended without pay for a previous incident, provides ample evidence of a worsening condition needing immediate remedial attention. That Mr. Kinsella's behavior these past few years stands in marked contrast to a teaching period spanning nearly two decades in which there was evidence of considerable teaching honor, the panel hereby recommends the following actions:

1. Mr. Kinsella be suspended, without pay, for a period of 45/200 days of the school year, and further

2. Because the panel feels it is without competence to make a judgment regarding the question of Mr. Kinsella's relative emotional stability; during the time of suspension, a comprehensive professional medical evaluation pursuant to Section 913 of the New York State Education Law be required by and for the Board of Education and that such an individual making the evaluation be provided with a copy of the charges, the transcripts of the hearings and the panel's decision and whatever other information is necessary concerning Mr. Kinsella and further,

3. That if the evaluation is negative, the Board discharge Mr. Kinsella immediately and seek to have his license as a teacher in New York State revoked, and further,

4. That if the evaluation is positive, the said Mr. Kinsella be required to commit to whatever procedures are recommended by the evaluation,

EXHIBIT G

at no expense to the district, for whatever length of time may be required, with periodic progress reports provided as determined by the Board, and further,

5. That after the period of suspension, a teaching assignment for which he is qualified be provided, preferably in an elementary school setting where he as highly lauded, and a program of supervision be instituted that is positive, consistent, and firm, and with regular reports of progress as determined by the Board, and furtner,

6. That Mr. Kinsella be instructed, both orally and in writing by the Superintendent of Schools, that he is <u>not</u> to use physical force at <u>any time</u> in the future with students, unless there is ample evident of imminent physical danger to self or others, and further,

7. That during the 1974-75 school year, the said Mr. Kinsella be given no assignments in which he would be responsible for teaching or controlling secondary age students, including coaching. and further,

EXHIBIT G

8. That after a trial period of a year (74-75) and upon recommendation of the Superintendent to the Board of Education, consistent with the success of the recommended remedial actions, Mr. Kinsella, be permitted to resume a teaching position and those coaching duties especially golf, in which he has engaged with success in the past, and further

9. That if Mr. Kinsella refuses to cooperate or to respond favorably to counseling and supervision as evidenced by periodic reports mentioned heretofore, he be discharged and the Board seek to have his license as a teacher in New York State revoked.

10. That this determination be confidential and available only to the immediately concerned parties.

Dated: June 21, 1974
Buffalo, New York

/s/ Ronald F. Uba
Ronald F. Uba

/s/ Herman J. Bowman
Herman J. Bowman

/s/ Donald W. Munson
Donald W. Munson

EXHIBIT G

EXHIBIT H ANNEXED TO AFFIDAVIT
DETERMINATION OF THE BOARD OF EDUCATION

IN THE MATTER OF
SWEET HOME CENTRAL SCHOOL DISTRICT
OF AMHERST AND TONAWANDA

vs. DETERMINATION OF THE

DONALD M. KINSELLA BOARD OF EDUCATION

The members of the Board of Education have read the transcript of the hearing held in the above proceeding, examined the exhibits placed in evidence and the report submitted by the hearing panel. The Board of Education found probable cause for the charges against Mr. Kinsella on March 5, 1973. The charges were heard before a panel selected pursuant to Section 3020(a) of the New York State Education Law. The panel's report is dated June 21, 1974.

The Board at executive session on July 25, 1974, concluded as follows:

1. On April 30, 1970, Mr. Kinsella did grab the hair of Audrey Brooks and pull her to the floor. This use of physical force was unnecessary.

2. On December 17, 1971, Mr. Kinsella did pull the hair of Donald Gullo and slap him. This use of physical force was not justified by the circumstances.

3. On February 23, 1973, Mr. Kinsella did grab and strike Stephen Ulmer. This action also represented an excessive use of physical force.

The Board of Education also finds that these actions did involve excessive physical force, or corporal punishment, in violation of District policy and rules, in excess of that allowed by State Law, and beyond that which would reasonably be used by a competent teacher. Based upon these acts, which indicate a patternof increasingly severe improper conduct, and taken together with the fact that Mr. Kinsella has previously been disciplined

for conduct unbecoming a teacher, the Board concludes that Mr. Kinsella is not competent to properly perform his prescribed duties.

Accordingly, he is dismissed from his employment, effective immediately. In view of his appointment as an instructor for the entire summer school program, his compensation shall continue until the end of that program.

Dated July 24, 1974

By the order of the Board of Education

/s/ Kenneth J. Rebman
Kenneth J. Rebman, President

Concurring opinion of M. Duane Mongerson, Richard M. Greaney and Kenneth F. Eberl.

We agree with the determination of the Board that Donald M. Kinsella is guilty of each of the charges and should be discharged immediately from his tenured teaching assignment at Sweet Home Senior High School.

However, Mr. Kinsella should have the opportunity to obtain a probationary teaching appointment in an elementary school. During the probationary period, he should not be assigned any cocurricular activities at the secondary school level.

/s/ Kenneth F. Eberl
Kenneth F. Eberl

/s/ Richard M. Greaney
Richard M. Greaney

/s/ M. Duane Mongerson
Dr. M. Duane Mongerson

Members Present:

Kenneth F. Eberl
Dewey E. Ertell, Jr.
Richard M. Greaney
John Milley, Jr.
Dr. M. Duane Mongerson
Kenneth J. Rebman
Clifford J. Waterhouse

EXHIBIT H

DOCKET
DIARY
FILE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA, Plaintiff,

- vs -

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, Defendants.

AFFIDAVIT IN OPPOSITION

CIV-73-187

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

DOUGLAS S. CREAM, being duly sworn, deposes and says:

1. That he is an Assistant Attorney General of the State of New York, of counsel to LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for defendant Ewald B. Nyquist, Commissioner of Education of the State of New York.

2. That this affidavit is submitted in opposition to plaintiff's motion for supplementary relief.

3. That following entry of the judgment of the Three-Judge District Court as amended February 20, 1974, the Commissioner of Education, pursuant to statutory authority, promulgated and published an amendment to §82.10 of Title 8 N.Y.C.R.R. Chapter II, Part 82.

4. That the statutory authority relied upon by the Commissioner is found in §§207 and 3020-a of the Education Law.

5. That in addition, the Commissioner of Education promulgated and published pursuant to his aforementioned statutory authority, §82.11 of Title 8 N.Y.C.R.R., Chapter II Part 82 (Education). A copy of the aforementioned regulations is annexed hereto as Exhibit "1".

6. That said amendments to the Commissioner's regulations were intended as, and in fact, do comply fully with the judgment of this Court which found §3020-a unconstitutional in the absence of such regulations.

7. That the affidavit of Bernard F. Ashe, Esq., sworn to on the 22nd day of November, 1974, does not in any

manner state or suggest that the content of the regulations aforementioned, does not fully and completely meet the requirements of constitutionality as set forth in the Judgment of the Three-Judge Court as aforementioned.

8. That the affidavit of plaintiff, sworn to on the 25th day of November, 1974, does not in any manner state or suggest that the content of the regulations aforementioned, does not fully and completely meet the requirements of constitutionality as set forth in the judgment of the Three-Judge Court as aforementioned.

9. That the affidavit of counsel for plaintiff merely attacks the procedures by which the regulations were enacted.

10. That plaintiff by the aforesaid affidavit, now seeks to enlarge upon the jurisdiction of the District Court by seeking a review of the manner in which the aforesaid regulations were promulgated.

11. That counsel for plaintiff sought precisely the same relief in the Supreme Court, New York, Broome County, in the Matter of Hodgkins v. Central School District No. 1, 78 Misc. 2d 91 (April, 1974).

12. That the Court (FISCHER, J.), held that the regulations above-referenced were adopted in full compliance with State law and procedure.

13. That upon information and belief, the source of which information is discussions had with Lawrence W. Reich, Esq., counsel for the Department of Education, a Notice of Appeal was filed in behalf of the named plaintiff to the Appellate Division for the Third Judicial Department.

14. That upon information and belief, the appeal has not been perfected by plaintiff.

15. That the claim of plaintiff that the regulations aforementioned were adopted in violation of State law does not

state a claim upon which relief may be granted pursuant to the Civil Rights Act or any other jurisdictional statute.

16. That 28 U.S.C. §2202 does not confer upon this Court jurisdiction which it otherwise could not exercise.

17. That the affidavit of plaintiff, sworn to November 25, 1974, alleges at paragraph 25 et seq certain improprieties in the procedure followed by the defendant Board of Education in its determination of June 21, 1974.

18. That the aforesaid allegations do not relate to any conduct on the part of defendant Ewald B. Nyquist as Commissioner of Education of the State of New York.

19. That by reason, therefore, defendant Nyquist does not herein respond to the allegations contained in paragraphs 25 et seq as aforementioned.

20. That by reason of all of the foregoing, this Court is without jurisdiction to grant any relief as against defendant Commissioner Ewald B. Nyquist.

WHEREFORE, defendant Nyquist respectfully requests that this Court deny the motion as it relates to the promulgation of Title 8, Chapter II, Part 82, §§82.10 and 82.11 of the New York Codes Rules and Regulations, and further, grant such other and additional relief as to the Court seems just and proper.

DOUGLAS S. CREAM

Subscribed and sworn to before me
this 27th day of November, 1974.

Kathleen M. Jackson
Commissioner of Deeds, Buffalo, N.Y.
Commission expires December 31, 1974.

EXHIBIT 1 ANNEXED TO AFFIDAVIT
IN OPPOSITION TO MOTION 1
COMMISSIONERS REGULATIONS

82.9 Demand for public hearing. Unless the employee or his attorney shall have served a written demand for a public hearing upon the hearing officer or if no hearing officer has yet been designated, upon the commissioner, at least five days before the date set for the hearing, the employee will be deemed to have waived his right to a public hearing and the hearing will be private.

Historical Note

Sec. added, filed June 29, 1970.

82.10 Conduct of hearings. (a) Cine photographs, still photographs, videotape recordings and audiotape recordings may not be taken at private hearings, and may be taken at public hearings only when permitted by the hearing officer.

(b) Representatives of the news media may be present at public hearings.

(c) The hearing officer shall have the power to adjourn the hearing from time to time as required.

(d) The hearing officer shall decide all motions and objections, but he may not dismiss the charges without the consent of the complainant or his attorney.

(e) If the hearing officer determines that the absence of a hearing panel member is likely to delay unduly the prosecution of the hearing, he shall order the replacement of such panel member. If the party who selected such panel member fails to select a replacement within two days, the commissioner shall select such replacement. If the panel member to be replaced is the third member, and if the hearing officer determines that the panel members selected by the parties cannot agree on a replacement, the commissioner shall select a replacement. In no event shall a hearing proceed except in the presence of three panel members.

(f) Members of the hearing panel may question witnesses and parties, subject to the right of the hearing officer to disallow such questions if he deems them improper. No questions may be addressed to the employee unless he has been sworn as a witness with his own consent.

(g) At the conclusion of the testimony, the hearing officer may adjourn the hearing to a specified date not more than 14 days after the conclusion of the testimony, to permit preparation of the transcript, submission by the parties of memoranda of law, and deliberation by the panel members. The hearing officer shall provide for the preparation and delivery of one copy of the transcript of the hearing to each panel member and to the employee, if requested. The complainant and the board may order copies of the transcript directly from the stenographer.

(h) The findings of the panel on each charge, and the recommendations of the panel as to disciplinary action, if any, against the employee shall be submitted to the hearing officer, together with the panel members' copies of the transcript, no later than the adjourned date of the hearing. Upon receipt of such findings and recommendations, the hearing officer shall declare the hearing concluded, and shall forward the findings and recommendations, together with the three copies of the transcript, to the commissioner. The commissioner shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to the penalty if one is warranted, together with a copy of the transcript of the proceedings before the hearing panel, to the employee and to the clerk of the employing board.

Historical Note

Sec. added, filed June 29, 1970; amd. filed Feb. 28, 1974 eff. Feb. 28, 1974. Added last sentence in (h).

82.11 Decision of the board. The decision of the board of education shall be based solely upon the record in the proceedings before the hearing panel, and shall set forth the reasons and the factual basis for the determination.

Historical Note

Sec. filed Feb. 28, 1974 eff. Feb. 28, 1974.

Exhibit "1"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILE COPY
NO 326-L

DONALD M. KINSELLA,

Plaintiff,

vs.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

CIVIL 1973-187

NOTICE OF MOTION-MOTION FOR SUPPLEMENTARY RELIEF 28 USC §2202

PLEASE TAKE NOTICE, that the undersigned will bring the annexed motion for further declaratory, injunctive, coersive and other relief before Part I, United States District Court for the Western District of New York at the United States Courthouse in the City of Buffalo, New York on the 9th day of December, 1974 at eleven o'clock in the morning or as soon thereafter as counsel can be heard.

PLEASE TAKE FURTHER NOTICE, that the motion requests the re-convening of a three-judge court to consider the relief sought herein if necessary in the court's judgment.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 6(d), Federal Rules of Civil Procedure, 28 U.S.C., opposing affidavits, if any, may be served not later than one day before the hearing of this motion.

DATED: November 22, 1974

BERNARD F. ASHE, ESQ.
JAMES R. SANDNER
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

TO: OHLIN, DAMON, MOREY, SAWYER & MOOT, ESQ.
(James S. McAskill, Esq., of Counsel),
Buffalo, New York; THOMAS L. DAVID, ESQ.,
Buffalo, New York, for Defendant Central
School District No. 7 of the Towns of
Amherst and Tonawanda, Erie County

LOUIS J. LEFKOWITZ, ESQ., Attorney
General of the State of New York
(Douglas S. Cream, Esq., Assistant
Attorney General, of Counsel), for
Defendant Ewald B. Nyquist, Commissioner
of Education of the State of New York

MOTION II

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA, Plaintiff,	:	CIVIL 1973-187
vs.	:	MOTION
BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, Defendants.	:	

Plaintiff, Donald M. Kinsella, moves this court pursuant to 28 USC §2202, and based upon:

1. the prior pleadings and proceedings in this matter,

2. the order signed by the Hon. James L. Oakes, the Hon. John O. Henderson and the Hon. John T. Curtin, dated February 19, 1974, which is final and binding in the absence of an appeal by any party.

3. the amendment order signed by the Hon. John T. Curtin dated February 20, 1974 and

4. the affidavit of Donald M. Kinsella sworn to on November , 1974, for an order granting the following relief:

I. The reconvening of the three judge federal panel pursuant to 28 USC §2281 and §2284.

II. The vacature of the determination of defendant Board of Education dated July 25, 1974, as being contrary to and violative of the order of the three judge court dated February 19, 1974.

III. The reinstatement of Plaintiff to his tenured teaching employment with defendant Board of Education.

IV. Such other, further, appropriate remedial action as this court finds just.

Dated: November 22, 1974.

James R. Sandner

BERNARD F. ASHE
JAMES R. SANDNER
Office & P. O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

vs.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY, AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

CIVIL 1973-187

AFFIDAVIT OF DONALD M. KINSELLA IN SUPPORT OF MOTION FOR SUPPLEMENTARY RELIEF

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

DONALD M. KINSELLA, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action, and I have personal knowledge of the matters stated below.

2. I make this affidavit in support of this motion for supplementary relief.

3. On April 19, 1973, a complaint was filed on my behalf commencing this action.

4. That complaint requested certain relief against the defendants Board of Education of the Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County (referred to herein as the Board of Education), and Ewald B. Nyquist, Commissioner of Education of the State of New York, as follows:

a. Assumption of jurisdiction by the Federal courts in this matter.

b. The immediate convening of a three-judge Federal district court to hear and determine this proceeding pursuant to Title 28 USC §2281 and §2284.

c. The issuance of a permanent injunction restraining the defendants, their agents, employees, attorneys and others acting in concert therewith from the enforcement, operation or execution of §3012 and §3020-a of the New York State Education Law.

d. A declaration that §3012 and §3020-a of the New York State Education Law are unconstitutional.

e. Preliminary injunctive relief restraining the use and enforcement of §3012 and §3020-a of the New York State Education Law as against the plaintiff.

f. Consequential damages suffered by the plaintiff as a result of actions taken by the defendants.

g. Costs, attorneys' fees and other relief.

5. Upon information and belief, each of the defendants was duly served and each defendant appeared, answered and defended in this action.

6. In my complaint, I alleged that my employer, the Board of Education, has instituted charges against me pursuant to New York Education Law §3012 and that each of the defendants was following the procedure for prosecuting those charges pursuant to New York State Education Law §3020-a.

7. The complaint alleges that the utilization of the above enumerated statutes resulted in the deprivation of my rights which are protected by the United States Constitution.

8. By order granted and filed on May 8, 1973, the Hon. John O. Henderson, United States District Judge, granted my motion for a restraining order temporarily prohibiting the further prosecution of the charges then pending against me.

9. By order granted and entered on June 19, 1973, Judge Henderson granted a preliminary injunction pending the convening of a three-judge court to hear the cause.

10. By order dated June 27, 1973, the Hon. Irving R. Kaufman, Chief Judge of the United States Court of Appeals for the Second Circuit, issued a designation naming the members of the three-judge panel requested in Judge Henderson's order of June 19, 1973.

11. By order granted and entered on August 23, 1973, Judge Henderson directed the filing of briefs and designated the date for oral argument.

12. The three-judge panel convened, received briefs and thereafter, heard oral arguments from all parties on September 14, 1973.

13. The three-judge panel rendered its decision in an order granted and entered on February 19, 1974, a copy of which is annexed hereto as Exhibit A and is officially reported at 378 Fed. Supp. 54.

14. In the said order, the Court, speaking through Judge Henderson, stated:

> "For the foregoing reasons we declare that §302-a [sic] of the Education Law of the State of New York, absent administrative regulations requiring decision to be based upon evidence elicited before the hearing

panel and the decision of the Board to set forth the reasons and factual basis therefore, is unconstitutional, and the defendants are enjoined from its enforcement until such time as appropriate administrative or legislative action is taken to remedy the defects in the procedures here involved."

15. By order granted and entered on February 20, 1974, the section number of the statute involved was corrected to "Section 3020-a."

16. Upon information and belief, thereafter and on or about February 28, 1974, the Regents of the State of New York adopted an amendment to 8 NYCRR §82.10(h) and also adopted a new section designated 8 NYCRR §82.11. Copies of these amendments are annexed hereto as Exhibit B.

17. Thereafter, the procedures previously commenced against me, pursuant to New York State Education Law §§3012 and 3020-a, and which engendered my attack on the state statutes, were continued to conclusion.

18. On or about June 21, 1974, the panel designated to hear the charges brought against me rendered its advisory decision to the Board of Education. A copy of that decision is annexed hereto as Exhibit C.

19. In that panel report, the panel stated its findings and its recommendations as to disciplinary action purportedly pursuant to 8 NYCRR §82.10(h).

20. Upon information and belief, on or about July 25, 1974, the Board of Education rendered its "Determination of the Board

of Education." A copy of that determination is annexed hereto as Exhibit D.

21. Upon information and belief, the Sweet Home Central School District of Amherst and Tonawanda is another designation for the district governed by defendant.

22. Neither I nor my legal or other representative was invited to participate, present proof or arguments on my behalf to the Board of Education prior to the rendering of its determination.

23. Upon information and belief, the panel report does not contain any summary of evidence elicited at the hearing, nor does it contain the findings of the panel on each charge when compared to the charges annexed as Exhibit B to the original complaint in this action.

24. The order of the three-judge court annexed as Exhibit A states that the written decision of the Board of Education must set forth "reasoning and the factual basis for its decision" and also indicate the evidence relied upon in rendering its decision.

25. Neither the report of the panel nor the decision of the defendant board complies with the plain words and the intent of the court's decision in that:

a. while Exhibit D states that the transcript of the hearing before the hearing panel has been read and the evidentiary exhibits examined, Exhibit D completely fails to set forth any relationship whatsoever between the conclusions reached and the transcript or exhibits,

b. there is no indication that the Board's conclusions are based upon the record as

opposed to conclusions based upon extraneous and ex parte matters,

c. there is no explication of reasons or enumeration of the factual bases for the Board of Education's decision,

d. there is no reference whatsoever to specific pages in the transcript or to specific items of evidence relied upon by the Board of Education in rendering its decision,

e. Exhibit D fails to provide an adequate record upon which a state court may review the deliberations and determination of the Board of Education and, therefore, the appeal process as set forth in Education Law §3020-a-5 remains illusory, and,

f. the panel's report contains no credibility resolutions or any other factual conclusions based upon the record made before it, nor does it comply with statutory or regulatory requirement.

26. Upon information and belief, the defendant school district's close, continued, persistent relationship with the prosecution of the charges against me resulted in a denial of due process.

27. Upon information and belief, the defendant Board brought and entertained the charges after being counseled and advised by its attorney, associated with a certain Buffalo law firm.

28. Upon information and belief, the defendant Board defended in this federal court proceeding through an attorney associated with the same Buffalo law firm.

29. Upon information and belief, the defendant Board continued the prosecution of this tenure hearing while being represented by an attorney associated with the same Buffalo law firm.

30. Upon information and belief, the same defendant Board decided the tenure hearing matter still with the counsel and advice of an attorney associated with the same Buffalo law firm referred to above.

31. Upon information and belief, the attorney for the Board of Education has in some way taken part in the decision-making process thereby denying plaintiff his due process rights, and further defeating the meaning and intent of the order of the three-judge court.

32. That the above actions on the part of the school board and its attorney has resulted in the continued denial of my due process rights, in that the decision by the Board fails to comply with the order of the court and the rules and regulations promulgated under the statute declared unconstitutional thereby resulting in the taking of liberty and property rights without due process, as complained of in my complaint.

33. Upon information and belief, the defendant Board of Education received appropriate notice of the three-judge court's order dated February 19, 1974.

34. By reason of the Board of Education's subsequent affirmative action contrary to the specific directions contained in the order of February 19, 1974, the Board of Education has thereby violated that order.

35. That the defendant Board of Education has acted in derogation of the rights guaranteed to me and required by the court's decision.

36. Upon information and belief, this court retains continued jurisdiction over this cause with full power to issue further orders necessary and proper to secure plaintiff's constitutional rights.

37. This motion is presented without prejudice with respect to my right to present subsequent motions against one or both of the defendants for further relief and such right to present such subsequent motions are here expressly reserved.

38. This court is requested to determine the need or absence of need to reconvene a three judge federal panel in this case.

WHEREFORE, plaintiff respectfully requests this Court grant the relief enumerated in the Motion to which this is annexed.

Dated: November , 1974

DONALD M. KINSELLA

Sworn to before me this
day of November, 1974.

Notary Public

Exhibit "A" annexed to affidavit is a copy of the Decision of the Three Judge Panel (see pp. 161 through 167 infra).

Exhibit "B" annexed to affidavit is a copy of the Amendment to the Commissioner's Regulations (see pp. 171 infra).

Exhibit "C" annexed to affidavit is a copy of the panel report (see pp. 175 through 178 infra)

Exhibit "D" annexed to affidavit is a copy of the Determination of the Board of Education (see pp. 179 through 180 infra).

AFFIDAVIT OF THOMAS L. DAVID, ESQ.
IN OPPOSITION TO MOTION II

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff

vs.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants

AFFIDAVIT IN OPPOSITION

CIV-73-187

STATE OF NEW YORK)
COUNTY OF ERIE) SS.
CITY OF BUFFALO)

THOMAS L. DAVID, being duly sworn, deposes and says:

1. That he is an attorney and partner in the law firm Gross, Shuman, Laub & David and that he acts as counsel to the Board of Education of the Sweet Home Central School District of Amherst and Tonawanda (formerly Central School District No. 7 of the Towns of Amherst and Tonawanda) hereinafter referred to as the "Board of Education".

2. That in his capacity as counsel to the Board of Education, the deponent has given the Board of Education legal advice on many matters, including personnel related matters, and including the Board's responsibilities in dealing with the charges against the Plaintiff.

3. That the deponent has counseled and advised the Board of Education with respect to procedures required to be followed in connection with charges against the Plaintiff and proceedings commenced against him under Section 3020 A and 3012 of the New York Education Law and the proceedings which resulted therefrom in 1971 and 1974. The deponent has been aware of and sensitive to the Plaintiff's arguments that the combination of

the decision making process and the prosecution process may under certain circumstances be prejudicial to a person whose rights are being considered, even though the deponent is advised that as a matter of law an administrative body may act in a combination of roles without violating the concept of due process. As the three judge panel stated on its order of February 19, 1974, "...the Supreme Court has indicated that the performing of multiple functions by individuals or groups in administrative process is not per se a due process violation."

4. The deponent informed the Board of Education after the decision of this court on February 19, 1974, that he would not be present for their deliberations and would not discuss their determination until the Board of Education had made its findings and had drafted the findings and decision. The deponent did not take part in deliberations of the Board of Education which led to Plaintiff's dismissal, and has been careful to restrict his advice to outlining the procedural responsibilities of the Board of Education under the appropriate statutes and decisions.

5. The deponent did not personally take part in the prosecution of the charges against Plaintiff, although the case and "prosecution" if you will, was handled on behalf of Board of Education by David C. Laub, the deponent's law partner. David C. Laub has not even been introduced to six of the seven members of the Board of Education, and he has met with the seventh member of said Board of Education on previous occasions only in connection with business ventures unrelated to the Plaintiff. Neither David C. Laub nor any member or associate of deponent's law firm counseled or took part in the deliberation of the Board of Education in connection with the Plaintiff's dismissal.

6. That the Board of Education's actions with respect to the Plaintiff have been in accordance with the decision of the three judge court dated February 19, 1974, and in accordance with and in compliance with the appropriate sections of the New York Education Law and the regulations thereunder.

7. That the decision of the Board of Education (Plaintiff's Exhibit D) as required by the decision of the three judge panel states that it was based upon the transcript of the hearing and the exhibits placed in evidence at that hearing. The determination states the factual findings and the rationale for Plaintiff's dismissal.

8. That if the Board of Education had not acted in a proper and appropriate manner, the Defendant had recourse against that Board of Education through the courts of New York State and through the Commissioner of Education of New York State. The Defendant has declined to pursue his rights. There is no reason to believe that the courts in the State of New York or the Commissioner of Education would not grant appropriate relief to the Plaintiff, if the Board of Education did not properly perform its duties.

WHEREFOR, the deponent requests the Court to deny Plaintiff the relief requested in his Motion.

/s/ Thomas L. David
Thomas L. David

Subscribed and sworn to
before me this 5th day of
December, 1974.

/s/ Mary Ann Walker
Notary Public

MARY ANN [illegible]
Notary Public, State of New York
Qualified in [illegible]
My Commission Expires [illegible]75

PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION FOR
SUPPLEMENTARY RELIEF (MOTION I)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

- against -

CIV-1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWONDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION FOR
SUPPLEMENTARY RELIEF

(MOTION I BASED ON THE
AFFIDAVIT OF BERNARD F. ASHE)

BERNARD F. ASHE
JAMES R. SANDNER
Attorneys for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205

IRA PAUL RUBTCHINSKY, ESQ.
(of counsel)

TABLE OF CONTENTS

	Page
New York Constitution Provisions Applicable.....	i
Applicable Statutes.....	ii
Rules and Regulations Under Challenge.....	xiii
Preliminary Statement.....	1
Argument	
Point I - THIS COURT HAS CONTINUED JURISDICTION TO DECIDE THE ISSUES RAISED IN THIS MOTION, AND A THREE-JUDGE PANEL SHOULD HERE THE CAUSE.....	4
Point II - ACTION TAKEN BY THE DEFENDANT COMMISSIONER OF EDUCATION PURPORTING TO COMPLY WITH THE ORDER OF THE THREE-JUDGE FEDERAL PANEL IS NULL, VOID AND OF NO EFFECT..	11
A. POWERS EXCEEDED.....	15
B. IMPROPER EXERCISE.....	30
Point III - NEW YORK EDUCATION LAW §3020-a WAS DECLARED TOTALLY UNCONSTITUTIONAL AND IN ABSENCE OF APPROPRIATE REMEDIAL ACTION, IT IS VOID.....	37
Conclusion.....	39

§ 4. **[Department heads]**

The head of the department of audit and control shall be the comptroller and of the department of law, the attorney-general. The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department. The head of the department of agriculture and markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.

§ 8. **[Departmental rules and regulations; filing; publication.]**

No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws. Adopted by Constitutional Convention of 1938; approved by the people Nov. 8 1938.

Applicable Statutes

NEW YORK EDUCATION LAW

§ 301. Commissioner of education continued

The office of commissioner of education is hereby continued. Subject to the general direction and control of the regents of the university, he shall continue to have, exercise and perform the functions, powers and duties conferred or imposed by law upon the commissioner of education. He shall continue to exercise the judicial functions conferred by law upon the commissioner of education and, subject to rules of the regents, to make, execute and issue in the name of the department such determinations, decisions, orders, notices and certificates as may be required for the exercise and performance of the functions, powers and duties conferred or imposed upon the department. With the approval of the board of regents, he shall continue to prepare the annual estimates and requests for appropriations for operation, maintenance and construction of the New York state school for the blind and shall review and incorporate into the departmental budget the state university program budget transmitted to him by the state university trustees. All moneys appropriated for the New York school for the blind, or derived from other sources in the course of the administration thereof, shall be expended upon vouchers approved by the commissioner of education, when and in the manner authorized by the board of regents. The regents may adopt rules conferring and imposing upon the commissioner of education such additional powers and duties as may be required for the effective administration of the department and of the state system of education.

§ 305. General powers and duties

The commissioner of education is hereby charged with the following powers and duties:

1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents.

2. He shall have general supervision over all schools and institutions which are subject to the provisions of this chapter, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control.

3. He shall have general supervision of industrial schools, trade schools and schools of agriculture, mechanic arts and home making; he shall prescribe regulations governing the licensing of the teachers employed therein; and he is hereby authorized, empowered and directed to provide for the inspection of such schools, to take necessary action to make effectual the provisions therefor, and to advise and assist boards of education in the several cities and school districts in the establishment, organization and management of such schools.

4. He shall also have general supervision over the state teachers colleges and state colleges for teachers which have been, or which may hereafter be, established as required by the provisions of this chapter.

5. He shall be ex officio a trustee of Cornell university.

6. He shall be responsible for the safe keeping and proper use of the department and university seal and of the books, records and other property in charge of the regents, and for the proper administration and discipline of the various officers and divisions of the education department.

7. He may annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher by any authority whatever or declare any diploma issued by a state teachers college and state colleges for teachers ineffective and null as a qualification to teach a common school within this state, and he may reconsider and reverse his action in any such matter.

8. He shall cause to be prepared and keep in his office records of all persons who have received, or shall receive, certificates of qualification to teach or diplomas of the state teachers colleges, and state colleges for teachers, with the dates thereof, and shall note thereon all annulments of such certificates and diplomas, and reversals thereof, with the dates and causes thereof, together with such other particulars as he may deem expedient.

9. The commissioner shall procure with the consent of the federal authorities complete lists giving the names, ages and destination within the state of all alien children of school age and such other facts as will tend to identify them, and shall deliver copies of such lists to the several boards of education and school boards in the respective localities within the state to which said children shall be destined, to aid in the enforcement of the provisions of this chapter relative to the compulsory attendance at school of children of school age.

10. He may administer oaths and take affidavits concerning any matter relating to the duties of his office or pertaining in any way to the schools of the state or any part thereof.

11. He is hereby authorized to furnish, by means of pictorial or graphic representations, additional facilities for instruction in geography, history, science and kindred subjects, to the schools, institutions and organizations under the supervision of the regents. Material collected for this purpose may, under regents' general rules, be lent for a limited time to responsible institutions and organizations for the benefit of artisans, mechanics, and other citizens of the several communities of the state. He may from time to time enter into contracts necessary for carrying out this provision.

12. The commissioner of education is authorized and directed to establish and provide for the maintenance and conduct of courses of study or training in state teachers colleges and state colleges for teachers and in colleges and universities and other educational institutions and in connection with other educational agencies for the purpose of training teachers in principles and methods of instruction, and to give them knowledge to fit them to instruct foreign born and native adults and minors over sixteen years of age in evening, extension, factory, home and community classes. Such courses of study shall be prescribed by the commissioner of education and shall continue for a period of not less than one year. No teacher employed to instruct foreign born and native adults and minors over sixteen years of age shall be employed by the state or compensated in whole or in part by the state, unless he shall have completed such course of study or training or shall have an equivalent thereof to be determined under the regulations of the commissioner of education. A special certificate shall be issued to teachers who have completed such course of study or a course of instruction which is equivalent thereto, provided, however, that temporary permits may be issued by the commissioner of education to teachers who are qualified to give such instruction pending the completion of such a course of study or training.

13. The commissioner of education or the board of education or trustees of any city or school district may provide for the establishment of courses of instruction or study and schools in connection with factories, places of employment, or in such other places as he or they may deem advisable, for the purpose of giving instruction to foreign born and native adults and minors over the age of sixteen years. Such course of instruction or study shall include instruction in English, history, civics and other subjects tending to promote good citizenship and to increase vocational efficiency. Such course of instruction and study shall be prescribed by the regents of the university of the state of New York, and shall be in conformity with rules to be

14. a. All contracts for the transportation of school children involving an annual expenditure in excess of fifteen hundred dollars and all contracts to provide, maintain and operate cafeteria or restaurant service by a private food service management company shall be awarded to the lowest responsible bidder, which responsibility shall be determined by the board of education or the trustee of a district, with power hereby vested in the commissioner to reject any or all bids if, in his opinion, the best interests of the district will be promoted thereby and, upon such rejection of all bids, the commissioner shall order the board of education or trustee of the district to seek, obtain and consider new proposals. All proposals for such transportation or cafeteria and restaurant service shall be in such form as the commissioner may prescribe. Advertisement for bids shall be published in a newspaper or newspapers designated by the board of education or trustee of the district having general circulation within the district for such purpose. Such advertisement shall contain a statement of the time when and place where all bids received pursuant to such advertisement will be publicly opened and read either by the school authorities or by a person or persons designated by them. All bids received shall be publicly opened and read at the time and place so specified. At least five days shall elapse between the first publication of such advertisement and the date so specified for the opening and reading of bids. Nothing contained in this section shall apply to annual extensions of a contract secured through competitive bidding when such annual extensions (1) are made by the board of education or the trustee of a district, under rules and regulations prescribed by the commissioner, and (2) do not extend the original contract period beyond five years from the date transportation or cafeteria and restaurant service commenced thereunder. The board of education or the trustee of a school district electing to extend a contract as provided herein, may, in its discretion, increase during such extension the contractual amount paid in the preceding year by an amount not to exceed the national consumer price index increase for the twelve month period immediately preceding the termination date of the contract, provided it has been satisfactorily established by the contractor that there has been at least an equivalent increase in the amount of his cost of operation, during the period of the contract.

b. Notwithstanding the provisions of paragraph a of this subdivision, in the case of any emergency arising out of an accident or other unforeseen occurrence or condition affecting pupil transportation services within a district, and requiring immediate action which cannot await competitive bidding, interim contracts for pupil transportation services may be let by the board of education or the trustee of such district for a period not to exceed one month, pending the award of a contract for such services in compliance with the provisions of paragraph a of this subdivision.

15. The extension industrial teacher training courses heretofore established are continued under the jurisdiction and control of the education department. Members of the faculty to teach such courses shall be appointed by the commissioner of education and, subject to the approval of the director of the budget, shall be classified, allocated and paid in accordance with the schedules contained in section three hundred fifty-five-a of this chapter.

17.[1] Whenever a mistake has been made, or an honest dispute exists, as to the location of the division line between land owned by the state, which is under the jurisdiction, care, custody or control of the department of education, and adjoining privately owned land, the commissioner of education, acting for and on behalf and in the name of the people of the state New York, may enter into a boundary line agreement, fixing and determining the division line between such lands, subject to the approval of the attorney general as to form, content and manner of execution.

18. He shall also have and execute such further powers and

§ 308. Other powers

The commissioner of education shall also have power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents.

§ 100. **Records of terms of judges of courts of record and not of record**

The secretary of state must keep a record of the time of commencement and termination of the official term, of each judge of a court of record and a court not of record, except a justice of the peace of a town or police justice of a village.

§ 101-a. **Legislative notification of the proposed adoption, amendment, suspension or repeal of agency rules**

1. Definitions. As used in this section,

a. "Agency" means any state board, bureau, commission, department, authority, division, or officer authorized by law to make rules.

b. "Rule" means the whole or part of each agency statement of general applicability or regulation or code that implements or applies law, or prescribes the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof, except such as relates to the organization or internal management of the agency.

2. At least twenty-one days prior to the adoption of any rule, the agency proposing to take such action shall send a notification of such proposed action to the temporary president of the senate and the speaker of the assembly. This notification shall: (a) refer to the statutory authority under which the action is proposed, (b) give the time and place of any public hearing that may be scheduled concerning the proposed action or state the manner in which data, views or arguments may be submitted to the agency concerning the proposed action, and (c) contain a copy of the complete text of the proposed rule, and (d) contain a fiscal statement setting forth the fiscal consequences of the proposed action on the state and its local governments.

3. If the agency finds that it is necessary for the preservation of the public health, safety or general welfare to dispense with the requirements of subdivision two, the agency may dispense with such requirements and adopt the rule, as an emergency measure; provided, however, that the agency, within sixty days after the emergency measure's effective date, complies with subdivision two and takes final action relating to the emergency measure. The agency's finding and a brief statement of the reasons for its finding shall accompany the emergency measure.

4. The legislature in the joint rules of the senate and assembly may exempt from the requirements of this section certain rules which have or would have no significant fiscal implications.

5. This section does not relieve any agency from compliance with any statute requiring that its rules be filed with or approved by designated persons or bodies before they become effective.

6. A proceeding to invalidate any rule on the ground of noncompliance with the procedural requirements of this section must be commenced by the temporary president of the senate or the speaker of the assembly within four months from the effective date of the rule. No rule shall be valid unless adopted in substantial compliance with this section; provided, however, that the inadvertent failure to give notice as provided in this section

§ 101-b. Application by municipal corporations for the suspension of certain rules

1. Definitions. As used in this section,

a. "Agency" means any state board, bureau, commission, department, division or officer authorized by law to adopt rules.

b. "Rule" means the whole or part of each agency statement of general applicability or regulation or code that implements or applies law, including the amendment, suspension or repeal thereof.

c. "Municipal corporation" means a county outside the city of New York, a city, a town, a village or a school district.

d. "Governing body" means:

(1) In a county, a board of supervisors, county legislature or other body vested by its charter, other law or other valid enactment with jurisdiction to enact local laws;

(2) In a city, the board of aldermen, a common council, commission or other body vested by its charter or other law with jurisdiction to enact ordinances or local laws;

(3) In a town, the town board;

(4) In a village, the board of trustees; and

(5) In a school district, the board of education, board of trustees or sole trustee.

2. A municipal corporation may, by resolution adopted by its governing body, apply to the agency which has adopted a rule for the mandatory suspension of such rule for the balance of the municipal corporation's current fiscal year, provided the rule was filed in the office of the secretary of state after the commencement of the municipal corporation's current fiscal year.

3. Upon the receipt of such an application, the agency which adopted the rule shall forthwith by order suspend its applicability to the petitioning municipal corporation for the balance of such corporation's current fiscal year, unless the agency determines by order that the immediate implementation of the rule is necessary for public health, safety or welfare, or that its postponement would be contrary to express provision of law.

4. This section shall not relieve a municipal corporation from complying with a rule until such time that the agency which has adopted the rule shall issue an order pursuant to this section suspending its applicability to such corporation.

§ 102. Official compilations of codes, rules and regulations

1. Each department, board, bureau, officer, authority, commission or other agency of the state, authorized by statute to adopt codes, rules or regulations shall transmit to the secretary of state a certified copy of every such code, rule and regulation except such as relate solely to the organization or internal management of such department, board, bureau, authority, commission or other agency of the state in force at the time of such transmittal or to become effective thereafter, certified by the head of such department, board, bureau, authority, commission or other agency of the state, or if such head is a board or commission, by the chairman or secretary thereof, together with a citation of the statutory authority pursuant to which each such code, rule or regulation was adopted.

2. Immediately upon adopting any new code, rule or regulation or any amendment to or repeal thereof, except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state, the original thereof shall be filed in the office of the department of state. Attached thereto shall be a certificate citing the statutory authority pursuant to which each such change or new code, rule or regulation was adopted, the date of adoption, and signed by the head of the department, board, bureau, authority, commission, or other agency of the state, or if such head is a board or commission, by the chairman or secretary thereof, or, in lieu of such signatures, it may be signed by a person designated by such head or chairman aforementioned, provided such designation is made in writing, contains therein the signature of the person designated, and is filed with the department of state.

3. It shall be the duty of the secretary of state to prepare a compilation of all such codes, rules and regulations in such form and order as he may determine. He shall not, however, change the language of any existing code, rule or regulation except a title or explanatory caption; but he shall recommend any such change as he may deem advisable to the department, board, bureau, officer, authority, commission or other agency of the state authorized to adopt such code, rule or regulation.

4. Such compilation when printed and published, shall include all codes, rules and regulations except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state, in effect on the first day of January, nineteen hundred forty-five, and which he shall certify as a true copy of the compilation prepared by him. Such compilation shall be known as the "official compilation of codes, rules and regulations of the state of New York." Such compilation shall presumptively establish the codes, rules and regulations of the state of New York, except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state, in force and effect on the first day of January, nineteen hundred forty-five. The official supplements to such compilation published as hereinafter provided shall presumptively establish any changes in such codes, rules and regulations and any new codes, rules or regulations except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state, affected by addition, amendment or repeal, or adopted during the period ending on the thirty-first day of December in any year immediately preceding the publication of such supplement. Nothing in such official compilation or any new edition thereof or official supplement thereto shall be construed as repealing or amending any code, rule or regulation adopted by any department, board, bureau, authority, commission or other agency of the state, and in case of any inconsistency arising through omission or otherwise between the official compilation and such codes, rules and regulations as filed in the office of the secretary of state, the latter shall prevail.

§ 103. Future editions and supplements of official compilations

1. In any year the secretary of state may, whenever he shall believe that the public interest will be served thereby, cause a new edition of such official compilation or any volume thereof to be published, which compilation shall be published as soon as practicable, and shall set forth the codes, rules and regulations except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state on file in the office of the department of state on the date as of which such new edition is published.

2. The secretary of state may, whenever he deems it to be necessary, cause to be published an official supplement to the official compilation, showing all new and all changes in existing codes, rules and regulations adopted since the effective date of the codes, rules and regulations embraced in the latest edition of the official compilation or since the end of the period covered by the preceding supplement.

3. Any new edition of such compilation published as heretofore provided, and any supplementation thereof or thereto, shall presumptively establish that the codes, rules and regulations contained therein are on file in the department of state, and are effective, unless otherwise stated, on the date as of which such new edition, or any volume thereof, or a supplementation thereto, is published.

4. Any code, rule or regulation contained in any new edition of the official compilation, or any volume thereof, or any supplementation thereto, shall not be printed in any official supplement published for any period prior to the date as of which such new edition, volume, or supplementation is published.

§ 104. Departmental cooperation

The secretary of state may advise with the several departments, boards, bureaus, officers, authorities, commissions and other agencies of the state which are authorized by statute to issue codes, rules or regulations, to the end that the same may, so far as possible, be uniform in style and form, be properly numbered and captioned and be free from matter which is obsolete.

L.1951, c. 800.

Historical Note

Derivation. Executive Law of 1909, § 38, added L.1944, c. 618, § 2.

§ 105. Changes in codes, rules or regulations

Changes in any code, rule or regulation except such as relates solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state shall be made by a department, board, bureau, officer, authority, commission or other agency of the state only by addition, amendment or repeal. Every resolution or order affecting such an addition, amendment or repeal shall refer to the appropriate title and to the appropriate section or paragraph as published in the official compilation or supplement thereto. In the case of a proposed new code, rule or regulation except such as relates solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state for which there is no appropriate title, the head of such department, board, bureau, authority, commission or other agency of the state shall confer with the secretary of state and shall, prior to the adoption of any resolution establishing such code, rule or regulation, have his approval in writing of the proposed title, captions and numbers of such code, rule or regulation and any parts, paragraphs or sections thereof.

§ 106. Proof of codes, rules and regulations

Any code, rule or regulation of the state of New York may be read in evidence from the official compilation or supplement thereto. To entitle any copy of a code, rule or regulation published, other than those published in such official compilation or supplement thereto, to be read in evidence there shall be contained in the same book or pamphlet a printed certificate of the secretary of state that such copy is a correct transcript of the text of the code, rule or regulation as published in such official compilation or supplement thereto. For such a certificate the secretary of state shall collect such a fee as he shall deem just and reasonable.

82.10 Conduct of hearings. (a) Cine photographs, still photographs, videotape recordings and audiotape recordings may not be taken at private hearings, and may be taken at public hearings only when permitted by the hearing officer.

(b) Representatives of the news media may be present at public hearings.

(c) The hearing officer shall have the power to adjourn the hearing from time to time as required.

(d) The hearing officer shall decide all motions and objections, but he may not dismiss the charges without the consent of the complainant or his attorney.

(e) If the hearing officer determines that the absence of a hearing panel member is likely to delay unduly the prosecution of the hearing, he shall order the replacement of such panel member. If the party who selected such panel member fails to select a replacement within two days, the commissioner shall select such replacement. If the panel member to be replaced is the third member, and if the hearing officer determines that the panel members selected by the parties cannot agree on a replacement, the commissioner shall select a replacement. In no event shall a hearing proceed except in the presence of three panel members.

(f) Members of the hearing panel may question witnesses and parties, subject to the right of the hearing officer to disallow such questions if he deems them improper. No questions may be addressed to the employee unless he has been sworn as a witness with his own consent.

(g) At the conclusion of the testimony, the hearing officer may adjourn the hearing to a specified date not more than 14 days after the conclusion of the testimony, to permit preparation of the transcript, submission by the parties of memoranda of law, and deliberation by the panel members. The hearing officer shall provide for the preparation and delivery of one copy of the transcript of the hearing to each panel member and to the employee, if requested. The complainant and the board may order copies of the transcript directly from the stenographer.

(h) The findings of the panel on each charge, and the recommendations of the panel as to disciplinary action, if any, against the employee shall be submitted to the hearing officer, together with the panel members' copies of the transcript, no later than the adjourned date of the hearing. Upon receipt of such findings and recommendations, the hearing officer shall declare the hearing concluded, and shall forward the findings and recommendations, together with the three copies of the transcript, to the commissioner. The commissioner shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to the penalty if one is warranted, together with a copy of the transcript of the proceedings before the hearing panel, to the employee and to the clerk of the employing board.

Historical Note

Sec. added, filed June 29, 1970; amd. filed Feb. 28, 1974 eff. Feb. 28, 1974. Added last sentence in (h).

82.11 Decision of the board. The decision of the board of education shall be based solely upon the record in the proceedings before the hearing panel, and shall set forth the reasons and the factual basis for the determination.

Historical Note

Sec. filed Feb. 28, 1974 eff. Feb. 28, 1974.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

- against -

CIV-1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWONDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION FOR
SUPPLEMENTARY RELIEF

Preliminary Statement

On April 19, 1973, the plaintiff filed a complaint in the United States District Court for the Western District of New York alleging that New York Education Law §§3012 and 3020-a are unconstitutional. The complaint also sought a declaration by the federal court that the statutes were in fact unconstitutional and, in addition, sought permanent injunctions precluding the further enforcement of these statutes.

After hearing oral argument on the motions and allowing the submission of briefs, this court granted a temporary restraining order and made an application to the Second Circuit for the convening of a three-judge panel. From

April, 1973 until the time subsequent to the issuance of the permanent injunction by the three-judge federal panel (February 19, 1974), the tenure hearing proceeding which had been commenced against Mr. Kinsella was stayed.

The three-judge federal panel convened, heard arguments, received briefs and ultimately rendered its decision dated February 19, 1974. (378 F. Supp. 54) The decision declared New York Education Law §3020-a unconstitutional. A permanent injunction was issued. Vacatur of the injunction was conditioned upon "...appropriate administrative or legislative action [being] taken to remedy the defects in the procedures here involved." (378 F. Supp., 60)

Almost immediately thereafter (within eight days), the Department of Education through the Commissioner of Education and the Board of Regents, proposed, ratified and adopted the rules and regulations which are placed in issue in the instant matter.

No application was made to this or any other court to obtain vacatur, modification, or other relief from the injunction issued by the three-judge federal panel and binding upon the defendants. No appeal to the Supreme Court was perfected. Thereafter, the defendant Commissioner of Education ordered the continuation of all tenure hearings which had previously been stopped directly as a result of the decision of the three-judge federal panel in the instant

case. The tenure hearing against plaintiff was also resumed. In accordance with the order of the Commissioner of Education, the plaintiff participated in the tenure hearing which had previously been commenced against him and which had been stayed during the pendency of the action in this court. After completion of the hearing, a panel recommendation was issued and thereafter the Board of Education rendered its determination in this matter.*

The instant motion is an application pursuant to Title 28, U.S.C. Federal Rules of Civil Procedure, Rule 7(b) which is brought by the plaintiff seeking relief pursuant to 28 U.S.C. §2202. Mr. Kinsella seeks a further necessary determination by this court or by an appropriate three-judge federal panel compelling continued compliance with the order and injunction dated February 19, 1974 and amended February 20, 1974.

Jurisdiction over all of the parties for purposes of this motion is based upon the service of the original process commencing the initial action.

* Both the panel recommendation and the Board determination are annexed to the moving papers as Exhibits G and H, respectively.

POINT I

THIS COURT HAS CONTINUED JURISDICTION TO DECIDE THE ISSUES RAISED IN THIS MOTION, AND A THREE-JUDGE PANEL SHOULD HEAR THE CAUSE.

This action was brought seeking the restraint of enforcement, operation and execution of New York Education Law §§3012 and 3020-a by reason of a conflict between these statutes and the Constitution. (See 28 U.S.C. 2281.) The action necessitated a declaration of the constitutionality of the statutes, (see 28 U.S.C. §2201) (decision of J. Henderson is appended as Appendix A), and a three-judge panel was requested. The panel, once convened, reasoned that the instant case was not one which called for federal abstention, (378 F. Supp., 56).

Having decided the issue of constitutionality of New York Education Law §3020-a, this federal court is now being asked to evaluate the events which have transpired during the past ten months. It is the position of the plaintiff that this court has continued jurisdiction which enables it to hear and determine the question of whether New York Education Law §3020-a has been revitalized and whether the rules and regulations enacted by the Commissioner of Education pursuant to the order of the three-judge federal panel conform with the laws of the State of New York or are void and of no effect. This court also has jurisdiction to determine appropriate penalties which are to be imposed upon

the defendants if any and to award monetary, injunctive and coercive relief.

Continued jurisdiction over the parties in an action which resulted in a permanent injunction is maintained by the federal district court pursuant to 28 U.S.C. §2202 which states:

> "§2202. Further relief
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964."

(See Terry v. Adams, (1952) 345 U.S. 461, 470; 97 L. Ed. 1152, 1161, 73 S. Ct. 809, 814.) This is true even where a contingency is created so as to allow the vacature of the injunction upon application after the occurence of a specified condition precedent. (See Glenn v. Field Packing Co., (1933) 290 U.S. 177; 78 L. Ed. 252 54 S. Ct. 138), or where relief is initially denied. (See League of Nebraska Municipalities v. Marsh (D. Neb., 1962) 209 F. Supp. 188, 196.) No express reservation of jurisdiction need appear in the order granting what would ordinarily be final relief. "The court continued to have control of the parties and the subject matter." Illinois Bell Telephone Co. v. Slattery (7 Cir., 1939, 102 F. 2d 58, 65. See also Vermont Structural Slate Co. v. Tatko (2 Cir., 1958, 253 F. 2d 29). In fact, the further relief sought "...need not have been demanded, or even proved, in the original action for declaratory judgment." Marks v. 220.

Harris (2 Cir., 1958, 255 F 2d 518, 522; cert. den. 358 U.S. 831, 3 L. Ed. 2d 69, 79 S. Ct. 51).

In the instant case, there was a seemingly final order with a contingency, the adoption of appropriate regulations or the enactment of legislation purporting to cure the constitutional defect in Education Law §3020-a. The action on the part of defendant Commissioner defeats the very rights which plaintiff sought to preserve by bringing the instant lawsuit. The statutes which formed the basis for the original action (28 U.S.C. §§1343[3]; §§ 2281 and 2284; and 42 U.S.C. §1983), are also the bases for a possible new independent action by plaintiff against the same defendants. However, in order to prevent a multiplicity of lawsuits, 28 U.S.C. §2202, allows an application to the court for further relief. Jurisdiction over the parties is retained for the purpose of entertaining a motion for further relief. (See Marks v. Harris, id., 522).

Having determined that there is jurisdiction to entertain this motion, the question of pendent jurisdiction persists. In Siler v. Louisville & N.R.R. Co., (1908) 213 U.S. 175; 53 L. Ed. 753 29 S. Ct. 451, a leading case in this regard, the Court stated:

> "The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided

Please note: There is no page 222. It has not been omitted from the record.

> the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." (213 U.S., 191). (Emphasis added.)

In the instant case, the prime issue presented to this court concerns the current validity of an injunction which was issued by the court ten months ago and which was subsequently disregarded by defendants after purporting to act in conformity with the terms of that injunction. The state statute originally involved need not be reinterpreted because it has already been declared unconstitutional by the court. However, the court must analyze certain state statutes and orders to determine if the actions taken by the defendants violate plaintiffs rights in such a way as to defeat the very purpose which brought the plaintiff into court in the first instance. Since the court is being requested to scrutinize state statutes and orders to see if due process is being observed, serious consideration should be given to convening a three-judge panel to hear and determine the issues raised in this and its companion motion.

NECESSITY FOR THREE JUDGES

While three judges are needed to determine questions of constitutionality of state statutes (28 U.S.C. §2881), the United States Supreme Court has held that this is a very narrow grant of authority which is ended once the temporary and permanent restraining orders are granted which restrain

the enforcement of state statutes or orders (Public Service Commission v. Brashea Lines (1941) 312 U.S. 621; 85 L. Ed. 1083, 61 S. Ct. 784). The court may itself initiate the inquiry for the purpose of determining the necessity of three judges. (Davis v. County School Board of Price Edward Co., Va. (E.D. Va., 1956) 142 F. Supp. 616, 617.) While the executive action of a Governor exceeding the law has been interpreted as being insufficient to invoke the authority of the predecessor statute (23 U.S.C. §266) when there is no challenge to any state statute (Phillips v. U.S. (1941) 312 U.S. 246 85 L. Ed. 783 61 S. Ct. 475 but see Sterling v. Constantin (1932) 287 U.S. 378, 77 L. Ed. 375, 53 S. Ct. 190) the three-judge court must be convened to determine a challenge, on constitutional grounds, by a state statute:

> "As the validity of provisions of the state constitution and state statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by the judges [cases cited]. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191, 29 S. Ct. 451, 53 L. Ed. 753; Louisville & Nashville R. Co. v. Garrett, 231 U.S. 208, 303,34 S. Ct. 48, 58 L. Ed. 229;]other cases cited]." (287 U.S. 393-394.)

A three-judge panel, having passed upon the main statute, (New York Education Law §3020-a) should now

pass on the fruit of their suggestion--the rules and regulations purportedly adopted in conformity with the court's order. The "regulations" are "orders" within the perview of 28 U.S.C. 2281 (Albee Godfrey Whale Creek Co. Inc. v. Perkins, (DC N.Y. 1933), 6 F. Supp. 409). (Moody v. Flowers (1967) 387 U.S. 97, 18 L. Ed. 2d 28 643, 87 S. Ct. 1544.)

In Nieves v. Oswald (2 Cir., 1973) 477 F. 2d 1109, the court which found itself "dealing with the complexities of 28 U.S.C. §2281" determined that regulations promulgated by the New York State Commission of Correctional Services were subject to review by a three-judge panel pursuant to 28 U.S.C. §2281. The court said:

> "So far as we can determine, the governing regulations before us are authorized by statute, were promulgated by statewide authority and apply in all state prisons." 477 F. 2d 1114.

Likewise, the subject rules and regulations were promulgated pursuant to the statute directly under scrutiny by this court in the instant matter, the defendant Commissioner of Education has acknowledged statewise authority and the rules and regulations are conclusive and binding upon each and every tenured teacher in each and every school district in the state.

The consequence of allowing a single judge to decide that which should have been heard by a three-judge panel may be dismissal of the action, whereas the consequences of

having a three-judge panel hear the cause when a single judge may decide the issues only affects the mode of appeal and not the jurisdictional mechanics of the case. The federal panel has already decided the fate of New York Education Law §3020-a. If it now requires plaintiff to go to another forum to obtain relief from the regulations specifically issued in response to the federal court order, it is unduly complicating the matter. Not only would a multiplicity of suits result on both federal and state levels involving the same litigants and the same facts whereby causing delay and undue costs and burdens to be cast upon the plaintiff, but it could also result in further distortion of the direction of this court as contained in its order and injunction. This court has already found a substantial federal question which still exists by reasons of the rules and regulations purporting to cure the constitutional defects already found by a three-judge panel. It is submitted that if the rules and regulations are improper or invalid, New York Education Law §3020-a remains unconstitutional and this plaintiff is entitled to relief in this court.

POINT II

ACTION TAKEN BY THE DEFENDANT COMMISSIONER OF EDUCATION PURPORTING TO COMPLY WITH THE ORDER OF THE THREE-JUDGE FEDERAL PANEL IS NULL, VOID AND OF NO EFFECT.

The three-judge federal panel declared that New York Education Law §3020-a was unconstitutional. Based upon that declaration, the court imposed a permanent injunction but granted the injunction with a contingency. The contingency allowed for revitalization of the state in the event that:

> "...appropriate administrative or legislative action is taken to remedy the defects in the procedures involved." Kinsella v. Board of Education 378 F. Supp., 60.

The court did not instruct the defendants as to how to implement the action which it mandated as a prerequisite to vacature of the injunction. The injunction thus continues "in force until it ceases to operate by its own terms or until vacated, modified or dissolved." 42 Am Jur. 2d Injunctions §323; Ladner v. Siegal, 298 Pa. 487, 148 A. 699, 68 ALR 1172. If the actions taken subsequent to the imposition of the injunction are not in compliance with both its terms and the mandates of applicable law, the injunction ordered by the three-judge panel must still be in force today. The subsequent continued prosecution of the plaintiff pursuant to New York Education Law §3020-a must then be considered void as against this plaintiff. Chandler v. Wallace Chandler, Inc., 365 Mich. 613, 113 N.W. 2d 901.

In order for there to be "appropriate" action as called for in the court order, the procedures followed in promulgating the corrective rules and regulations had to be lawful procedures. It is the purpose of Point II to analyze and discuss the requirements for the lawful enactment of administrative rules and regulations. The State of New York appeared and defended in this action through the Attorney General. Apparently, in response to the order of the three-judge federal panel, the State of New York has attempted to act through the defendant Commissioner of Education by imposing the rules and regulations which are set forth above in the section entitled "Rules and Regulations under Challenge". In Point I, the plaintiff has shown that this court has jurisdiction to hear, review and determine the validity of the rules and regulations which were enacted. In this Point (Point II) plaintiff shows conclusively that the rules and regulations were not properly promulgated and put into effect. In Point III, plaintiff concludes that the basic statute which was originally scrutinized by the three-judge federal panel, New York Education Law §3020-a, remains unconstitutional, void and of no effect.

Before analyzing the reasons for plaintiffs position, background history indicating the sources of the power of defendant Commissioner of Education should be analyzed. The Commissioner of Education and the Regents of the State of

New York are officers of and creatures of the New York State Constitution (Article 5, §4).

> "The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department."

The powers of the Regents as a corporate body are contained in New York State Constitution, Article 11, §2:

> "The corporation created in the year one thousand seven hundred eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents." (Emphasis added.)

The Court of Appeals has stated:

> "A written constitution is the fundamental expression of the sovereign will. Under our form of government that sovereign will resides in the people. A written constitution is not only the direc and basic expression of the sovereign will, but is the absolute rule of action and decision for all departments and offices of government in respect to all matters covered by it, and must control as it is written until it shall be changed by the authority that established it." Wright v. Hart, 182 N.Y. 330, 333 (1903).

With knowledge of the constitutional provisions in hand, attention must be turned to the Consolidated Laws of New York which embodies all of the legislative statutes. By

reason of the constitutional grant of authority quoted above, the legislative mandates define the absolute limit of authority of the Board of Regents in conformity with the Constitution.

New York State Education Law, §207 states:

> "Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the education system of the state, determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers duties and trusts conferred or charged upon the university and the education department. But no enactment of the regents shall modify in any degree the freedom of the governing body of any seminary for the training of priests or clergymen to determine and regulate the entire course of religious, doctrinal or theological instruction to be given in such institution. No rule by which more than a majority vote shall be required for any specified action by the regents shall be amended, suspended or repealed by a smaller vote than that required for action thereunder. Rules or regulations, or amendments or repeals thereof, adopted or prescribed by the commissioner of education as provided by law shall not be effective unless and until approved by the regents, except where authority is conferred by the regents upon the commissioner of education to adopt, prescribe, amend or repeal such rules or regulations." (Emphasis added.)

This section grants authority in two respects. First, the Board of Regents may establish its own rules and regulations

by the Commissioner of Education. The presupposition in this statute that the Commissioner of Education has authority to adopt rules and regulations is confirmed by Education Law, §§301, 305(1), 305(18) and 308 and in Jokinen v. Allen, 15 M. 2d 124, 182 N.Y.S. 2d 166, (Sup. Ct., 1958) which states:

> "The Commissioner of Education is the chief administrative officer of that body (Education Law, §101). He is charged with the execution of all educational policies determined upon it (Education Law, §305), and has the implied power to make rules, within the limits set by it, for this purpose." (Emphasis added.) 182 N.Y.S. 2d, 172.

There is no quarrel with the rule-making power of either the Commissioner or the Board of Regents.

The plaintiff submits that the exercise of that power in this case exceeded the powers of both the Board of Regents and the Commissioner of Education. This contention will be discussed in Subdivision A below. Plaintiff further maintains that even if this is a proper exercise of the rule-making power, the power was improperly exercised under New York law and therefore void. This is the subject of Subdivision B below.

A. POWERS EXCEEDED

As noted above, the defendant Commissioner has the power to adopt rules and regulations subject to the Regents approval. That power is spelled out in Education Law, Article 7 (§§ 301-304) and includes the power to:

1. "...enforce all general nd special laws relating to the educational system of the state..." Education Law §305(1).

2. "...prescribe regulations governing the licensing of the teachers [of certain schools]..." Id. §305(2).

3. "make regulations concerns the courses of study and training of teachers" Id. §305(12).

4. "execute such further powers and duties he shall be charged with by the regents." Id. §305(18).

Yet this legislative power is not unlimited. In Jokinen v. Allen, (supra), the court surveyed the field of rule-making by non-legislative bodies when it stated:

> "The general principle governing the delegation of power by legislative body to an administrative or executive official for the purpose of carrying out his policies and directives has been stated as follows:
>
> > '[A legislative body] does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward." Bowles v. Willingham, 321 U.S. 503, 515, 64 S. Ct. 641, 647, 88 L. Ed. 892.
>
> and
>
> > "Where 'standards are provided which, though stated in general terms are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers', the delegation of such powers to the administrative official by the legislature is lawful." Tropp v. Knickerbocker Village, Inc., 205 Misc. 200,

211, 122 N.Y.S. 2d 350, 361, affirmed 284 App. Div. 935, 135 N.Y.S. 618, quoting Aloe v. Dassler, 278 App. Div. 975, 106 N.Y.S. 2d 24, affirmed 303 N.Y. 878, 105 N.E. 2d 104. See also Fox v. Adams, Sup., 134 N.Y.S. 2d 534, 538." 182 N.Y.S. 2d, 173.

An administrative body may exercise its rule-making power only when the power has been specifically delegated by the legislature. Rosenbluth v. Finkelstein (1950) 300 N.Y. 402, 405; 1 N.Y. Jur. Administrative Law §105. To allow otherwise, that is, to allow an administrative agency to promulgate rules and regulations in the absence of legislative direction, would be a violation of the basic delegation of power from the people to the government. U.S. Constitution Article 1, §1; New York Constitution, Article 3, §1. Thus, a legislative body, empowered through a written constitution authorizing the body to carry out the law-making process, cannot allow the administrative body to usurp the law-making function although it may make certain delegations of responsibility. The implication in all of this is that the legislature must set forth standards or tests before it can legally and constitutionally empower a state body or agency to act in a quasi-legislative role of rule-maker. The courts have continually declared laws unconstitutional where those laws allow for the usurpation of legislative functions by other state officers or agencies.

"The statute before us is nothing less than an attempt to empower an administrative officer, the State

> Commissioner of Education, to register and license, or refuse to register and license, private schools, under regulations to be adopted by him, with no standards or limitations of any sort. The Legislature has not only failed to set out standards or tests by which the qualifications of the schools might be measured, but has not specified, even in most general terms, what the subject matter of the regulations is to be." Packer Collegiate Institute vs. University of the State of New York (1948) 298 N.Y. 184, 189.

While specifics and details may be delegated to the state agency with rule-making authority, the Legislature "must at least furnish those administrators with 'rule and principals' for guidance." See Packer, supra 298 N.Y., 190.

Where those guidelines do not exist, scrutiny to determine the outer limits of authority may be given to other areas of the law. (See Packer, 298 N.Y., 190.) Where, however, the Legislature has made its outer limits clear in the statute, it is inconceivable for a state functionary such as the Commissioner of Education to exceed those limits. In Packer, the court found that there were no limits set by the Legislature in the statute. The court then noted the consequence of such a carte blanche being expressly or impliedly bestowed upon the Commissioner of Education.

> "However, an examination of those regulations is illuminating since they show, we think, that the commissioner, left without legislative guidance, proceeded to legislate,

> broadly and in many different areas.... A comparison of those regulations with the bare and meager language of the statute forces the conclusion that, however good or bad the commissioner's rules may be, they were not controlled, suggested or guided by anything in the statute." Packer, supra, 298 N.Y. 191.

Obviously, since the Regents and the Commissioner must follow the guidelines set forth within a statute passed by the Legislature, a scrutiny of the statute must be made to determine the outer limits or prescribed areas of rule-making authority. Those limits are discussed below. It should be noted, however, that although in the Packer case no standards existed, in the instant matter, legislative guidelines bestowing authority are well defined. Education Law §3020-a is set forth below in its entirety.

§ 3020-a. Hearing procedures and penalties

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within ten days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desires a hearing on the charges. The inexcused failure of the employee to notify the clerk of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or

private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding. " [Emphasis Added.]

In order to determine whether the Commissioner of Education or the Board of Regents has the power to promulgate a rule, regulation or order, of the type purportedly adopted on February 28, the statute involved must be scrutinized carefully. 1 N.Y. Jur. Administrative Law §30 (page 341). Education Law §3020-a grants to the Commissioner of Education certain duties and functions in order to carry out the

provisions of that statute. A review of the statute shows that the Commissioner is given eight duties which are ministerial in nature. Those duties include:

1. The duty to receive notice of a need for a hearing (§3020-a(2)).

2. The duty to schedule a hearing within the local school district (or county seat) within twenty working days of the receipt of a request (§3020-a(3)(a)).

3. The duty to immediately notify the employee and the Board of Education of the time and place and procedures to follow in selecting a panel (§3020-a(3)(a)).

4. The duty to maintain a list of panel members as prescribed by statute (§3020-a(3)(b)).

5. The duty to designate a hearing officer (§3020-a(3)(c) paragraph 2).

6. The duty to designate a competent stenographer (§3020-a(3)(c) paragraph 2).

7. The duty to forward a report of the hearing to the employee and to the Board of Education (§3020-a(4)).

8. The duty to receive appeals in accordance with Article 7 of the Education Law (§3020-a(5)).

Each one of these duties is specific. By implication there is also a grant of authority to the Commissioner of Education to perform certain additional functions which are not specifically set forth in the statute. These functions constitute implied powers granted to the Commissioner of Education in conjunction with the above statute.

> "A power not expressly granted by the statute is implied only where it is

> so essential to the exercise of some power expressly conferred as plainly to appear to have been within the intention of the Legislature. An implied power must be necessary, not merely convenient, and the intention of the Legislature must be free from doubt." 1 N.Y. Jur. Administrative Law §32 (page 343). (Emphasis supplied.)

Thus the implied powers which are necessary to carry out the ministerial duties as enumerated above include the duty to create internal procedures in order to allow the New York Education Department to receive notice of the need for a hearing, to schedule a hearing, to notify the employee and the board of the time and place for a hearing, to maintain a list of panel members, etc. Also necessary is the power to create procedures as referred to the third duty enumerated above. There is also the power to create the list of panel members as noted in the fourth duty enumerated above, as well as the power to pay the hearing officer, panel members and stenographer. These constitute essential implied powers.

Administrative agencies derive their power from the:

> "Language of clear import [in the statute involved], admitting of no other reasonable construction (City of New York v. Maltbie, 274 N.Y. 90, 98, 8 N.E. 2d 289, 292, City of New York v. Interborough R. T. Co., 257 N.Y. 20, 38, 177 N.E. 295, 301; 1 N.Y. Jr., Administrative Law, §32, pp. 342-343). Unless the delegation of power to vary or amend statutory provisions is explicitly conferred by the Legislature on an administrative board or official, the exercise of power is ineffective (Pollard v. Trivia Bldg. Corp., 291 N.Y.

19, 23, 50 N.E. 2d 287, 289; Gerber v. Seaich Realth Co., 259 App. Div. 667, 669, 20 N.Y.S. 2d 263, 265; cf. 3 Sutherland, Statutes and Statutory Construction [3d ed.], §6603, pp. 268-272)." Durant v. MVAIC (2nd Dept., 1964) 20 A.D. 2d 242, 246 N.Y.S. 2d 548, 554, mod. other grounds 15 N.Y. 2d 408, 260 N.Y.S. 2d 1.

Since there is no express power to create rules with regard to the fourth numbered paragraph of the New York Education Law §3020-a, an analysis of implied powers must be made. In Application of Combs 2d 242, 237 N.Y.S. 2d 857 (Sup. Ct., 1963) 38 the court stated:

> "It is beyond dispute that certain powers not expressly granted may be implied. Such implied powers have been held to be (1) those necessarily arising or fairly implied from, or incident to, powers expressly granted, and (2) those which are not simply convenient but indispensable to the declared objectives and purposes of such powers. (Dillon on Municipal Corporations, Vol. 1, 5th Ed.; McQuillan on Municipal Corporations, Vol, 2, 3rd Ed.; New York Trap Rock Corp. v. Town of Clarkstown, 299 N.Y. 77, 85 N.E. 2d 873.) This contention thus raises two questions for resolution here: (1) Is the power asserted by the County Executive such that it can be held to be necessarily arising or fairly implied from, or incident to powers expressly granted; and (2) Is the power one which is not simply convenient, but indispensible to the declared objectives and purposes of the power and duties conferred upon him?" (237 N.Y.S. 2d 862-863.) (Emphasis supplied.)

Armed with the statute as well as the judicial understanding of administrative functions as they exist in New York, a close analysis of the regulations yields the conclusion that they are improper! There are two actual

amendments to the Commissioners rules and regulations (8 N.Y.C.R.R. §§ 82.10, 82.11). Prior to the adoption of these amendments, every provision of the Commissioner's Rules and Regulations 8 N.Y.C.R.R., Part 82 was specifically and wholly drived from the third numbered paragraph of New York Education Law §3020-a. Only after the three-judge federal panel rendered its decision were the amendments promulgated. Post hearing procedures are the subject of the fourth numbered paragraph of the statute. Yet the statute itself calls for no rules or regulations with respect to post hearing procedures. The directions to boards of education involved in tenure hearings are in the statute and are clear. There is no direction or implication allowing for further clarification or modification of the rules contained in Education Law §3020-a(4).

In Application of Combs, supra, the two requirements are put in the conjunctive. Not only must there be the necessity or implication of rule-making power, but the power must also be indispensible.

It would appear that the subject rules and regulations were enacted to maintain statutory viability subsequent to the three-judge court decision. However, indispensability as a requirement for administrative power is not fulfilled by the need to keep the statute viable. Indispensability only relates to the powers and duties conferred specifically by statute to the administrative agency. Since the

legislature did not give the Commissioner of Education the power to regulate with respect to the fourth numbered paragraph , defendant Commissioner cannot do so even in an attempt to rehabilitate the entire statute. To do so clearly usurps the powers specifically granted to the legislature by the people.

New York Education Law §3020-a shows that the Commissioner of Education is given rule-making authority with respect to one area only. Education Law §3020-a(3)(c) states that:

> "The Commissioner of Education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section."

New York regulations contained in 8 N.Y.C.R.R. §82.10 constitute the total number of rules the Education Department has determined to be necessary for the conduct of hearings. The newly established regulations deal exclusively with post hearing procedure, and thus fall squarely within the mechanics of Education Law §3020(a)(4) and outside the powers granted to the Commissioner in §3020-a(3)(c).

The statute is quite clear. The Commissioner may establish rules and regulations only in connection with the conduct of the hearing. The statute does not say that the Commissioner can establish rules and regulations with respect to the entire procedure under Education Law §3020-a. The Legislature gave no indication that it intended to confer upon the Commissioner of Education any powers other than

those expressly enumerated as ministerial powers as set forth above, as well as the one specific grant of discretionary power with respect to the conduct of only the hearing authorized under New York Education Law §3020-a(3).

This does not preclude the Commissioner of Education from enacting or promulgating a rule and regulation pursuant to some other expressed or implied statutory authority which he may have. However, such other authority in this case would still be in direct conflict with the words of the statute. "The employing board shall determine the case...." See LeTarte v. Board of Education, 65 Misc. 2d 147, 316 N.Y.S. 2d 787. The three-judge panel noted that in LeTarte, the Court explicitly stated with reference to the meaning of Education Law §3020-a(4):

> "It would appear that the findings and recommendations of the hearing panel, referred to in Subdivision 4 of the statute, are simply advisory in character and not in any way conclusive upon the employing board. To hold otherwise would render meaningless the statutory requirement that '*** the employing board shall determine the case by a vote of the majority of all the members of such board and fix the penalty or punishment, if any.'" (at page 784.)

The legislative intent is clear and the Commissioner of Education is statutorily powerless to change that intent.

Viewing this problem from another point, consider the fact that the Legislature thought it necessary to place a provision in the statute concerning the procedures to be

followed by the employing board of education subsequent to the time of the hearing. These are procedures which can result in rather severe penalties being placed upon the employee charged. Thus the statute itself is punative in nature. A punative statute must be construed strictly. The Court in LeTarte, supra, did construe the statute strictly and in accordance with the plain meaning of the words contained in the statute. The three-judge panel recognized that interpretation. The Legislature outlined the authority of a board of education with respect to determining the case and imposing a penalty. The Legislature failed or refused to grant the defendant Commissioner of Education the authority to command a board of education to act in any specific manner in connection with the procedures to be followed under Education Law §3020-a. Very clearly, since the Legislature chose to spell out the procedures to be followed by a board acting under New York Education Law §3020-a, it chose not to delegate that function to the Education Department, the Regents or the Commissioner.

If there had been no Kinsella decision or question of due process under the provisions of Education Law §3020-a(4), could the Department of Education, either through the Commissioner or through the Regents, adopt rules and regulations, such as were adopted on February 28, using as a basis for such adoption the rule-making authority granted under Education Law §3020-a(3)? The answer must be

no. Every word of a statute must be given a meaning in relation to the whole in accordance with McKinney's Statutes §98:

> All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof."

If the Education Department has the power to create rules and regulations imposing upon a board of education new duties, i.e., the duty to render a written decision and the duty to base the decision solely upon the record in the proceedings before the hearing panel, then the entire clause under Education Law §3020-a(4) is rendered meaningless. It is submitted that only the Legislature may act to rehabilitate the unconstitutional statute.

Looking over the entire ambit of rules of construction and interpretation as contained in McKinney's Statutes, it must be concluded that the act (Education Law §3020-a) must be read as a whole (McKinney's Statute §97) and must be harmonized (McKinney's Statutes §98). The Commissioner of Education is given authority to create rules with respect to the internal function of the hearing only. The procedures both before and after the hearings are outlined completely in and of themselves and are absolutely clear. The judicial interpretation of the legislative intent reinforces the conclusion that the wording of the statute

is clear. Since the duties of boards of education involved in teacher tenure hearings is specifically in New York Education Law §3020-a(4), and since neither the Commissioner of Education nor the Regents are given authority to promulgate rules and regulations with respect to the conduct of boards of education involved in such hearings, it must be concluded that 8 N.Y.C.R.R. §§ 82.10(H) as amended and 82.11 promulgated by the Regents on February 28, 1974 are void as being a usurpation of the legislative power by an administrative agency without any authority whatsoever. It is submitted that since the legislature has not acted to cure the defects this Court found in the statute, it remains void and all action taken pursuant to the void statute are also void.

B. IMPROPER EXERCISE

Rules and regulations of a quasi-legislative body have the force and effect of law when applied to individuals whose conduct is controlled thereby. With the understanding of this, the Constitutional Convention included Article 4, §8 in the New York State Constitution.

> No rule or regulation made by any state department..., except such as relates to the organization or internal management of a state department... shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations by appropriate laws."

There have been frequent attacks upon assorted rules and regulations based upon the failure to adhere to the constitutional provision set forth above. As has been stated, the Constitutional Convention of 1936 took note that the provision was intended to give the public knowledge of actions taken by administrative agencies.

> "The records of the debates in the Constitutional Convention of 1983, at which convention the provision alluded to was adopted, make it apparent that the primary purpose of the convention in proposing the adoption of section 8 was to assure public knowledge of regulations having the force and effect of law." People v. Calabro, 7 Misc. 2d 732, 170 N.Y.S. 2d 876, at page 878. (Emphasis added.)

The courts in New York are very concerned with agency usurpation of legislative functions. It is immaterial whether the administrative action is denominated as a rule or regulation or is called any other term.

> "In any event, though, it should be treated as a rule or regulation. The term 'rule or regulation', has not, it is true, been the subject of precise definition, but there can be little doubt that, as employed in the constitutional provision, it embraces any kind of legislative or quasi-legislative norm or procedure which establishes a pattern or course of conduct for the future. The label or name employed is not important and, unquestionably, many so-called 'orders' come within the term." (Authority omitted.) People v. Cull (1961) 10 N.Y. 2d 123, 218 N.Y.S. 2d 38 at page 40.

The provision has been interpreted to mean that legislative functions of an administrative agency or

governmental department (as opposed to the judicial or quasi-judicial functions of such a department) must be open to public view, scrutiny and knowledge at a time when the public, as a group or individually, may be affected by such rules and regulations. (See People v. Fogarty 18 N.Y. 2d 664, 273 N.Y.S. 2d 343 (1966)).

Note that the constitutional provision contains a modifying clause "...except such as relates to the organization or internal management of a state department...." The term "internal" was discussed in Ingalls Iron Works Co. v. Fehlhaber Corp., 29 A.D. 2d 29, 285 N.Y.S. 2d 369 (3rd Dept., 1967), in which Justice Gabrielli (now New York Court of Appeals Associate Judge) in discussing a contention that an order delegating authority need not be filed with the Department of State pursuant to the New York Constitution Article 4 Section 8, stated:

> "The delegation of authority to the Deputy Chief Engineer was not the type of pronouncement dealing with the exercise of the department's legislative or quasi-legislative power to which the constitutional provision is directed, nor was it of such a nature that it affected or imposed burdens upon the public generally within the construed meaning of the provision, as it was purely a designation of authority within the agency's organizational structure. The Official Order with which we are here concerned clearly and plainly relates to the internal operation of the Department of Public Works, and, as such, formed the basis of a valid acceptance

of the improvement within the purview of section 44 of the Highway Law." (Ingalls, 285 N.Y.S. 2d at page 372).

The Court in that case found the order to be wholly one of internal management and thus excluded under the constitutional provision. However, the lines between internal management and general concern can often be obscure. The test, as seen by Judge Gabrielli, is one which requires the scrutinization of the rule or regulation to determine if it is legislative in nature or if the rule affects the general public. If either of those tests are met, such a rule would then have to comply with the constitutional mandate of New York Constitution Article 4, §8. Obviously, the control of the numerous boards of education, as is attempted by the promulgation of the questioned new rules, must be considered legislative. If the Education Department had the power to generate such rules, why would the Legislature spell out the specific terms which appear in New York Education Law §3020-a(4)?

Cases which have found rules to be within the constitutional exception include People v. Fogerty, 18 N.Y. 2d 664, 273 N.Y.S. 2d 343 (1966) involving state policy rules for performing a blood tese; Ingalls, supra; In Re Gas Light Club, Inc. v. Catherwood, 30 A.D. 2d 904, 292 N.Y.S. 2d 242 (also a decision by Judge Gabrielli) (3rd Dept., 1968), involving procedures to be followed by auditors employed by

the industrial commissioner; Schuyler v. SUNY at Albany, 31 A.D. 2d 273, 297 N.Y.S. 2d 368 (3rd Dept., 1969), involving university rules proscribing demonstrations on campus. The leading case of People v. Cull, supra, requires the presumption that rules and regulations fall within, and not without, Article 4, Section 8.

> "The Constitution, in the clearest of language, requires that every rule and regulation made by board, bureau, officer, authority or commissioner--'except such as relates to the organization or internal management' of such office or agency--be filed in the office of the Department of State if it is to be effective. We know that underlying the regulations affecting the public filed in one, easily available, central place. We should not strive to read exceptions into the section or construe it so as to permit the official in charge of the bureau, commission or authority to avoid the necessity of filing by attaching the label 'order or 'statement of policy' or some other term to what is essentially a rule or regulation. The spirit and design of the constitutional provision are best effectuated by requiring the administrator, if he wishes the rules and regulations of his agency or department to be effective, to file them no matter what label is assigned to them." (218 N.Y.S. 2d at page 42.) (Emphasis added.)

Pursuant to the mandates of Article 4 Section 8, the New York State Legislature has passed certain provisions of the Executive Law:

(a) Section 101-a imposed the duty to notify the temporary president of the senate and the speaker of the assembly of the adoption of any rule.

(b) Section 102 requires the immediate transmittal to the Department of State of any new rule or regulation or any amendment or appeal of an old one.

(c) Section 105 requires a written approval by the Secretary of State prior to the adoption of a code rule or regulation or a change thereof where there exists no appropriate title, caption or number for such rule or regulation.

It would seem that the failure to comply with those statutes constitutes a mere irregularity readily remediable and thus not fatal to the regulation. However, the failure to comply with the Constitution and the statutes purporting to them, exposes the rules or regulations at issue to nullification at their inception. That is, the agency takes its chances with regard to the validity of the rule or regulation if it exceeds the perimeters of the statute which authorizes them and fails to properly file the rules.

> "The operative affect of the provision [speaking of Article 4 Section 8] seems clear. The administrative agency need not file anything with the Department of State, but anything which the agency does not file and which the courts hold to be a 'rule and regulation' will be denied by the courts the legal effect that would be accorded to it if it were filed." (Authority omitted.) People v. Calibrio, supra, 170 N.Y.S. 2d 878. (Emphasis added.) See also People v. Cull, supra.

Summarizing these cases, it is apparent that the constitutional provision was not intended to control internal

administrative functions. Where a rule affects the general public or is "legislative", that rule is governed by Article 4 §8. Resolution of any doubt is to be in favor of control by the constitutional provision. Failure to follow that provision and the sections of the Executive Law voids any such rule or regulation ab initio.

Applying the law in New York to the facts at hand, it appears that even if the rules and regulations represent the valid exercise of legislative power by the Commissioner of Education, they are still void. Validity depends upon compliance with the Executive Law provisions which in turn are a direct result of New York Constitution provisions. IN the light of §3020-a(3) and (4) compliance with the 8 N.Y.C.R.R. §82.10(h) as amended and 8 N.Y.C.R.R. §82.11, are invalid. The Legislature has not amended the law and thus the decision and injunction issued by the three-judge court is still effective and all action with respect to this tenure hearing is invalid.

POINT III

NEW YORK EDUCATION LAW §3020-a WAS DECLARED TOTALLY UNCONSTITUTIONAL AND IN ABSENCE OF APPROPRIATE REMEDIAL ACTION, IT IS VOID.

The three-judge panel declared the statute unconstitutional in toto. There was no reservation or preservation of any part of the Education Law §3020-a in the court decision. Although the statute is divided into parts, the court stated that:

> "...we declare that §3020-a of the Education Law of the State of New York...is unconstitutional, and the defendants are enjoined from its enforcement..." 378 F. Supp. 60.

In the same paragraph, the court afforded the appropriate body a guide to remedial action which would revive the statute. It seems clear that in the absence of appropriate corrective measures, the order of the three-judge federal panel accomplished two things. One, it enjoined all action which could or might be undertaken in conjunction with or pursuant to Education Law §3020-a. Two, it declared the statute unconstitutional.

The first conclusion leads us to a very interesting proposition. If the injunction remains in full force and effect and the condition imposed in the injunction has not been fulfilled, then the defendants have undertaken the continued prosecution of the tenure hearing charges against plaintiff Kinsella despite the presence of a valid enforceable

federal injunction. The defendants would thus be susceptible to the imposition of appropriate sanctions levied for the violation of a federal injunction. In any event, the action taken contrary to the specific requirements of the injunction must be considered a nullity and wholly void. Since there is a current binding and effective injunction baring action taken by the defendant Commissioner of Education and the defendant board of education, and in light of the continued unconstitutionality of New York Education Law §3020-a, all of the tenure hearing proceedings must be considered a nullity.

Revitalization, if possible at all, has not occurred here. By reason of the invalidity of the rules and regulations, this court is respectfully requested to reaffirm the injunction, and order a hearing to assess damages which flowed as a result of plaintiffs being obligated to defend in the tenure hearing proceeding.

CONCLUSION

NEW YORK EDUCATION LAW §3020-a REMAINS UNCONSTITUTIONAL. THE CONDITIONS FOR ITS REHABILITATION AS SET FORTH IN THE ORDER OF THE THREE-JUDGE FEDERAL PANEL HAVE NOT BEEN MET. THE INJUNCTION ISSUED BY THE THREE-JUDGE FEDERAL COURT ON FEBRUARY 19, 1974 HAS REMAINED IN FORCE SINCE THAT TIME.

Dated: December 5, 1974

Respectfully submitted,

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Of Counsel

PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION FOR
SUPPLEMENTARY RELIEF (MOTION II)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

- against -

CIV-1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWONDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION FOR
SUPPLEMENTARY RELIEF

(MOTION II BASED ON THE
AFFIDAVIT OF DONALD M. KINSELLA)

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TABLE OF CONTENTS

Preliminary Statement 1

Point I 2

Point II 16

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

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Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR SUPPLEMENTARY RELIEF

Preliminary Statement

The facts, statutes and rules and regulations applicable to the Motion denominated as Motion I based on the Affidavit of Bernard F. Ashe are also applicable to this motion and therefore are not reproduced here.

Point I of Motion I concerning the jurisdiction of the Federal Court is also applicable to this motion.

In the event the court grants the relief which is requested in the Motion I, by reaffirming the injunction of the three-judge federal panel and vacating the tenure hearing proceeding against plaintiff, there is no need to decide the instant motion.

POINT I

THE SUPREME COURT HAS GONE FURTHER THAN THE THREE-JUDGE PANEL IN PROTECTING RIGHTS OF THE PETITIONER.

The three-judge panel, in rendering its decision in this case, recognized that the Supreme Court had not yet decided Arnette v. Kennedy. As a result, the court included the following footnote in its opinion:

> "Since the provisions of §3020-a resemble, in some respects, those of 5 U.S.C. §7501, our decision here will have to be applied with deference to the Court's decision when handed down." Kinsella v. Board of Education, 378 F. Supp. 54, 59.*

Since the rendering of the District Court decision, Arnett v. Kennedy (cited as "Arnett") has been decided ____ U.S. ____ 40 L. Ed. 2d 15, 94 S. Ct. ____ 42 L.W. 4513 (1974).

Since there was no majority decision in Arnett v. Kennedy, in order to avoid misconstruing and overlooking the significant procedural due process holdings of the Court, the five separate opinions, which collectively composed the Court's decision, must be carefully read and viewed within the context of one another. Such a review must result in the conclusion that the Arnett decision expands the holding of the three-judge panel in this case.

In Arnett, Wayne Kennedy, a non-probationary federal employee employed by the Office of Economic Opportunity was

* The decision of the three-judge federal panel is often referred to in this brief as the Kinsella decision.

discharged by his supervisor, the regional director of the OEO, subsequent to receiving notice of written charges against him. The charge accused Kennedy of having made, without any proof and in reckless disregard of the actual facts, false and defamatory statements that the regional director and his administrative assistant had allegedly attempted to bribe a representative of an organization with whom the OEO had official dealings. Kennedy was accorded the right, pursuant to the provisions of the Lloyd-LaFollette Act and under regulations promulgated by the OEO and the Civil Service Commission, to receive at least thirty days advance written notice of the charges preferred against him and the right to reply to the supervisor's charges both orally and in writing. He was further accorded the opportunity to submit affidavits with respect to such charges and was notified that the material which was the basis for such charges was available in the regional office of the OEO for his inspection and that a copy of such material was also attached to the initial notice of written charges served upon him. Rather than respond to the preferred charges, Kennedy claimed that the procedures being utilized were unconstitutional because they violated his Fourteenth Amendment Rights to a trial-type hearing before an impartial hearing officer and further that the statements which formed the basis of the charges preferred against him were privileged under the First Amendment. Thereafter, Kennedy was notified by his immediate supervisor, the regional director, that his services were terminated. Concurrently,

he was notified that he had an opportunity to appeal the regional director's ruling to either the OEO or the Civil Service Commission. Immediately thereafter, Kennedy commenced suit in the District Court for the Northern District of Illinois alleging that the dismissal procedures set forth in the Lloyd-LaFollette Act were unconstitutionally vague and overbroad, while further alleging that such statute violated his Fifth Amendment rights in that it deprived him of his protected "liberty" and "property" interest in his employment without due process of law. A three-judge district court was thereafter convened. In granting summary judgment in favor of Kennedy, the district court concluded that the Lloyd-LaFollette Act was unconstitutionally vague since it failed to articulate guidelines setting forth the nature of speech which may constitute grounds for dismissal, and that the act violated Kennedy's right to due process of law since it failed to afford him a trial-type hearing prior to being deprived of his constitutionally protected interst in governmental employment.

Prior to analyzing the Court's complex decision, a review of the statutory and regulatory procedures utilized by the OEO to discharge Kennedy from his non-probationary governmental position would be appropriate.

Subsection (1) of 5 U.S.C. §7501 (the Lloyd-LaFollette Act), the statutory provision which served as the basis for Kennedy's dismissal, provides that an employee may be

removed or suspended "only for such cause as will promote the efficiency of the service." Subsection (b) of such statute sets forth the rights of an employee who is being charged with a violation of subsection (a). This subsection provides as follows:

> "(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to -
>
> (1) Notice of the action sought and of any charges preferred against him;
>
> (2) A copy of the charges;
>
> (3) A reasonable time for filing a written answer to the charges, with affidavit;
>
> (4) A written decision on the answer at the earliest practicable date.
>
> Examination of witnesses, trial, or hearing is not required, but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension, without pay, and the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission."

The regulations of the Civil Service Commission provide further procedural requirements supplementing those set forth in the Lloyd-LaFollette Act. The additional requirements in the regulations of the Civil Service Commission are

in part, that the employing agency must provide the affected employee thirty (30) days written advance notice of the preferred charges, and it must make available to the charged employee the materials which formulate the basis for such charges. Additionally, the regulations provide that such employee shall be entitled to a reasonable opportunity to answer the charges preferred and to submit affidavits in response thereto. The opportunity to answer included the right to respond personally and/or in writing. If the employee wishes to respond orally, the person hearing his answer must possess either the authority to make a final decision on the charges preferred or the authority to recommend a final decision. The additional regulations of the Commissioner, however, expressly indicates that, although the employee has an opportunity to answer the charges, such opportunity does not include the right to a trial or formal hearing with the right to examine witnesses. These regulations additionally required that the employee must receive notice of any adverse decision on or prior to the time the action with respect to such charges will be made effective. The notice is required to be in writing and it must set forth:

> "(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;
>
> (2) Of his right of appeal to the appropriate office of the Commission;

> (3) Of any right of appeal to the [employing or Civil Service Commission] agency. . ., including the persons with whom, or the office with which, such an appeal shall be filed;
>
> (4) Of the time limit for appealing . . .;
>
> (5) Of the restrictions on the use of appeal rights . . . ; and
>
> (6) Where he may obtain information on how to pursue an appeal."

An employee possesses the right to appeal to either the appropriate reviewing authority within the employing agency or directly to the Civil Servic Commission. In either instance the employee is entitled to an independent evidentiary trial type hearing, not bound in any way to the prior ruling of the prior decision-maker. The only trial-type hearing which was available within the OEO, pursuant to the OEO Regulations, would be a post-removal hearing. However, OEO's regulations provided that if the employee was ultimately reinstated, he would be awarded all back pay.

The three-judge federal panel in the instant action was concerned that its decision would be at variance with the Arnett decision which had not yet been handed down. It is submitted that the Arnett decision, rather than narrowing the holding in the case, is much broader. The analysis of the Arnett decision below covers three main areas: due process procedures, impartiality and vagueness.

DUE PROCESS PROCEDURES

The Arnett court reviewed the facts and the statute as set forth generally above and determined that the Lloyd-LaFollette Act was not unconstitutional. Six members of the court, in their divergent opinions, had an opportunity to discuss due process procedure and the application of that procedure to the act being scrutinized. Three of the Justices (Marshall, Douglas and Brennan) were of the opinion that a full trial-type evidentiary hearing was a necessary and essential element to due process prior to suspension.

> "The decisions of this Court compel the conclusion that a worker with a claim of entitlement to public employment absent specified cause has a property interest protected by the Due Process Clause and therefore the right to an evidentiary hearing before an impartial decision-maker prior to dismissal." (40 L. Ed. 2d, 75.)

Three other Justices (Powell, Blackmun and White) conclude that some form of pre-suspension due process procedure is required in order to obtain compliance with the provisions of the Constitution. These justices conclude that a full evidentiary hearing is required only prior to final termination and not necessarily prior to suspension. Justice White stated:

> "I conclude, therefore, that as a matter of due process, a hearing must be held at some time before a competitive civil service employee may be finally terminated for misconduct. Here, the Constitution and the Lloyd-LaFollette Act converged, because a

> full trial-type hearing is provided by statute before termination from the service becomes final, by way of appeal either through OEO or the Civil Service Commission, or both." (40 L. Ed. 2d, 51.)

Justice Powell, speaking for himself and Justice Blackmun states:

> "After removal, the employee receives a full evidentiary hearing, and is awarded back pay if reinstated." (40 L. Ed. 2d, 42.)

It is important to note that the six judges mentioned above (constituting all of the judges addressing themselves to the issue), did conclude that a full trial-type evidentiary hearing before an impartial decision-maker was a necessary and essential element of due process of law at some stage before the ultimate termination of employment.

A comparision of the procedures which were scrutinized in the Arnett case and the procedures which were before the three-judge federal panel in Kinsella indicates that there is a vast difference between the two dismissal procedures and that the procedures pursuant to New York Education Law §3020-a are greatly deficient. The Lloyd-LaFollette Act provides for a due process procedure prior to any suspension. That procedure includes the follow: (1) thirty days written advance notice of the reasons for the proposed dismissal; (2) access to the materials on the basis of which the charges were formulated; (3) the opportunity to respond to the charges in

writing including the opportunity to submit briefs and (4) a written decision based on the charges giving reasons for the decision. Only after this process has been completed and a decision has been rendered, may the employee be suspended. At that point, the employee continues to have a right to a full trial-type evidentiary hearing prior to the time of ultimate termination of employment. Under New York State Education Law §3020-a there is no pre-suspension due process procedure. The board of education receives the charges, finds probably cause and at the same time and without any input by the employee, the board may choose to suspend the employee with or without pay. In Arnett, the court concludes that some form of due process procedure is required before any suspension, while under the New York State statute, no due process of any nature or form is required before suspension.

Under New York State Education Law §3020-a, and after suspension, an evidentiary hearing before a hearing panel is held. While this may appear to be a full trial-type evidentiary hearing before an impartial decision-maker, that is not the case. The Kinsella court recognized this when it stated:

> "Section 3020-a has been construed to mean that the findings and recommendations of the hearing panel are merely advisory and not in any way conclusive upon the employing board. LeTarte v. Board of Education, 65 Misc. 2d 147,

316 N.Y.S. 2d 781 (1970). This statute does not require that the school Board's decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceeding even be sent to the school board...." 378 F. Supp., 59.

Even where there is compliance with the amendments to the Commissioner's rules and regulations (purporting to comply with the decision of the three-judge federal panel), the conclusions reached by the hearing panel convened pursuant to Education Law §3020-a still need not be adopted by the actual decision-maker, the board of education. The hearing panel itself is not the ultimate decision-maker, or for that matter a decision-maker of any sort. By comparison with the statute under scrutiny in the Arnett case, the statute analyzed by the Kinsella court provides no due process at all.

Even at the stage where the board of education ultimately makes a determination under the state statute, there is a lack of due process. The impartiality issue will be discussed below, however, there still is a very grave question as to whether there is ever a full blown trial-type evidentiary hearing before the ultimate decision-maker. Since the hearing is held before a hearing panel and not before the board of education, it is submitted that there is denial of due process and further that the Arnett court would reject the procedure as being a denial of due process.

It is submitted that the Kinsella court's understanding of the procedures to be followed pursuant to Education Law §3020-a indicates that not only is the hearing granted to a teacher held before a body other than the ultimate decision-maker, the decision rendered by that body (the hearing panel) has no impact whatsoever by way of influence on the ultimate decision-maker, the board of education.

IMPARTIALITY

In the Kinsella case plaintiff claimed a due process violation based on the multiple roles played by both the school board and the school boards attorney. The three-judge federal panel rejected this contention, reasoning that based upon certain United States Supreme Court decisions, multiple functions in and of themselves are not per se due process violations. (378 F. Supp., 60.) The decision, however, does defer to the Supreme Court decision in Arnett v. Kennedy rendered subsequent to the time when Kinsella was decided. In Arnett the Supreme Court had an opportunity to discuss the multiple roles played by participants under the federal procedural scheme embodied in the LloydLaFollette Act. On that issue, there was a clear majority which concluded that a determination must be made by a impartial decision-maker before there can be a final termination of employment. Justice White found that an impartial decision examiner at

the pre-termination hearing was necessary and it would be logical to state that he would find that same element of procedural due process of equal constitutional necessity at the post-termination trial-type evidentiary hearing.

Justice Powell and Blackmun concluded that the Constitution required that an impartial decision-maker was refused at the post removal [trial-type evidentiary] hearing:

> "My Brother White argues that affirmance is required because the supervisory official who would have conducted the pre-removal hearing was the 'object of slander that was the basis for the employee's proposed discharge.' Post, at ____, 40 L. Ed. 2d at 59. He would conclude that this violated the statutory requirement of an 'impartial decisionmaker.' I find no such requirement anywhere in the statute or the regulations. Nor do I believe that due process so mandates at the preremoval stage. In my view, the relevant fact is that an impartial decisionmaker is provided at the post-removal hearing where the employee's claims are finally resolved." 40 L. Ed. 2d, 42.

Justice Brennan and Douglas concluded that in order for the full trial-type evidentiary hearing to be constitutionally meaningful it must be held before a hearing officer who is "independent and unbiased". Id. at 79. Education Law §3020-a, even as amended by the rules and regulations fails to provide any impartial decision-making process! The hearing panel may in some ways be considered impartial (although the makeup of the panel itself necessitates bias or at least a predisposition toward the position taken by

the school district or charged teacher).* Even if the hearing panel were an unbiased and impartial body, its conclusions are not binding upon the board of education and therefore that impartial body is in no way a decision-making body. By contrast, the decision-making body--the board of education, is in no way impartial. It is the very body which in many instances initiates the charges themselves and in all instances reviews data and documentation in an ex parte matter in order to determine probable cause. Despite the protestations to the three-judge court on the part of the attorney for the school board that he would not participate in the Board's final decision, the fact is that a law partner of that attorney did prosecute the charges of the hearing. It must also be presumed that a member or partner in the same firm was present and participated in the deliberations of the board of education as school board attorney. This court is urged to consider all of this and conclude that in fact there is a multiplicity of roles played by both the school board and by the board's attorney, and that such multiplicity of roles does rise to the level of a due process violation in light of Arnett.

* The procedure followed for choosing panel members requires each of the adversary parties to select a panelist from among educators whose names are submitted by school board related organizations and teacher associations.

VAGUENESS

In Arnett v. Kennedy, the court was requested to decide the vagueness of a provision of the Lloyd-LaFollette Act and the rules and regulations upon which charges were brought and prosecuted against Mr. Kennedy. The court based upon the existence of regulations explaining the statute found it not to be vague. However, rules and regulations defining, outlining and describing charges which may be brought against a federal employee are vastly more detailed and refined then those found in New York Education Law §§ 3012 and 3020-a. While in the federal structure, the statutory grounds for dismissal are amplified and analyzed clearly and carefully in the rules and regulations, there are absolutely no rules and regulations whatsoever which in any way clarify, define or describe the vague generalities which constitute "cause" for dismissal of tenure teachers in New York. The federal district court is urged to reanalyze the grounds for dismissal under the state statutes in light of the Arnett decision.

POINT II

THE TENURE HEARING PROCEDURE HAS NOT AFFORDED PLAINTIFF DUE PROCESS.

The three-judge federal panel which decided the Kinsella case (378 F. Supp. 54) was very clear in its reasoning leading to the conclusion that New York Education Law §3020-a was unconstitutional. The court found that the statute did not require the board of education decision to be based upon the hearing record and evidence. Thus, the board was not precluded from relying on ex parte data in addition to (or to the exclusion of) the record adduced at the panel hearing. As a consequence, the Kinsella court noted:

> "Not only does the procedure outlined above fail to insure that the school board's decision will be based on evidence elicited at the hearing, it provides no safeguard against the school board's basing that decision on ex parte evidence. Furthermore, the problem is exacerbated by the fact that the school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision. The situation is analogous to that faced by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) involving the termination of welfare benefits. The standards set forth in that decision are applicable here:
>
> > '[T]he decisionmaker's conclusion ...must rest solely on the legal rules and on evidence adduced at the hearing. (Citations omitted.) To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on....' (Citations

omitted.) Id. at 271." Kinsella, 378 F. Supp., 60. [Emphasis added.]

Subsequent to the date when the Kinsella decision was rendered, the Commissioner of Education amended the rules and regulations in an attempt to rehabilitate the unconstitutional statute (Education Law §3020-a). (The question of whether the rules and regulations were properly promulgated and satisfy the conditions imposed by this court in order to rehabilitate the statute are covered in plaintiff's brief based upon the affidavit of Bernard F. Ashe, Esq., and denominated "Motion "I".) The hearing procedure was reactivated and continued to conclusion. A panel report was issued and the defendant board of education rendered its ultimate determination. A review of the events of the past ten months and a review of the documents generated as a result of the tenure hearing proceeding, indicates clearly that the worst fears contemplated by the Kinsella court and likewise the worst fears of the plaintiff have come to pass. Due process has been ignored by the defendants even after they have had the benefit of the new rules and regulations, and considered opinion of the Kinsella court.

The original charges (annexed to this brief as appendix A) upon which the defendant board of education found probable cause, contained five enumerated specifications. The panel convened and heard testimony covering over 700 pages of transcript on four separate hearing dates. Yet despite all of the testimony and evidence which passed before the panel,

the report rendered by the panel is sadly lacking in useable information. That panel report (annexed to the moving papers as Exhibit C) consists of three typewritten pages. All but the first paragraph of the panel report deals with penalties and alternative penalties. The first paragraph reveals no specific response to any of the five specifications in the charges lodged against Mr. Kinsella. There is no mention of the hearing panel's consideration or disposition of the Audrey Brooks incident of April 30, 1970, or any element of the specification dealing with that incident. The same holds true for the Donald Gullo specification. The panel report is completely silent as to the recommendation reached with respect to "use of excessive physical force" as that term is used in the fourth enumerated specification of the charges. The report fails to indicate the hearing panel's recommendation with respect to the allegation of insubordination contained in the fourth enumerated specification. The fifth specification of the charges--an umbrella intended to encompass all of the charges and concluding that as a totality the charges demonstrate incompetency--is also wholly ignored in the hearing panel report.

The only recital in the hearing panel report bearing a direct relationship to the specifications contained in the charges, is a statement that the evidence indicates Mr. Kinsella's behavior on one or more unspecified occasion was "unbecoming a teacher". Yet even in this lone instance, the

specification in the charges seemingly accused Mr. Kinsella of incompetence and not conduct unbecoming a teacher. (See Specification No. 5 of Affidavit A.)

In its decision, the Kinsella court indicated clearly its reasons for holding Education Law §3020-a unconstitutional. Since the Kinsella court's determination requires the board decision to be based upon the record, it is reasonable to presume that the hearing panel's report must also be based upon the record. In addition, it is also logical to presume that the hearing panel report must be held to the same standards as the ultimate board of education determination. Yet as shown above the hearing panel report is sadly lacking. The board determination is also deficient as will be demonstrated below.

The Kinsella court requires that the written decision must be based upon the evidence and must elaborate the reasons and factual basis for the decision. The reference to Goldberg v. Kelly, supra, is most important. The Supreme Court interprets an appropriate written decision as being a demonstration of compliance with the due process requirements of the Constitution. The failure to state reasons and the omission of an explanation as to evidence relied upon must indicate a demonstration of non-compliance with due process. Consequently it appears that the spirit and intent of the judgement of the Kinsella court has been ignored in the hearing panel report.

There is no indication that the determination rendered by the defendant Board of Education is any more compliant with the Kinsella decision. After the bare statement in the Board of Education determination indicating that the members had individually read the transcript and examined the exhibits, the Board goes on to "rubber stamp" its own probable cause determination. Yet, the defendant Board of Education fails to go so far as duplicating its prior effort word for word. The defendant Board of Education determination (appended to the Motion as Exhibit "D") is devoid of the requirements for a written decision as set forth in the Kinsella decision. The purpose of the lengthy hearing was to give the Board sufficient data upon which it could render an appropriate determination. Yet the only information which relates to the hearing at all are certain names, dates, and the minimal number of facts followed by a bare conclusion related to each of three alleged incidents. Once again, the Kinsella requirements are ignored. There is no indication that the hearing panel report was in any way determinative or influential upon the Board of Education. The Kinsella court noted that the procedures under Education Law 3020-a fail to "insure that the school board's decision will be based on evidence solicited at the hearing, . . ." (378 F. Supp., 60). There is no assurance in the written Board of Education determination that it did not rely upon ex parte evidence, or that it relied wholly and solely upon the evidence adduced at the

hearing. Moreover, as the court noted, the statute as interpreted in LeTarte vs. Board of Education, 65 Misc. 2d 147, 316 N.Y.S. 2d 781 (1971) does not require the decision to be based upon the record developed before the hearing panel. The Board determination reaffirms the three-judge panel's conclusion concerning the statute because the board's determination is wholly devoid of any relationship between the hearing panel's report and the final binding determination.

The Board of Education's determination wholly fails to relate the Board's bare conclusions to any part of either the transcript or the evidence. The decision does not link the conclusions reached to any part of the record. The failure to show any direct relationship between the hearing process and the decision process was a statutory defect found by the Kinsella court to be an irregularity of Constitutional proportions. "The statute does not require that the School Board's decision be based upon the record developed before the hearing panel." (Kinsella vs. Board of Education, supra, 59.) This constitutional irregularity still remains. There is no demonstration whatsoever in the written determination showing that the defendant Board of Education in any way based its conclusions upon the record developed before the hearing panel. A review of the panel report and the ultimate Board determination leaves the reader with the

impression that the defendant Board of Education did not have the privilege of reading or understanding the decision rendered by the Kinsella court or the injunction which flowed from that decision. The determination could have been prepared in the absence of the record! The panel report and the ultimate Board of Education decision bare no resemblance to one another either in conclusions stated or penalty imposed.

The Kinsella court was concerned that a reviewing tribunal would have no record upon which it could render a review and therefore such a review would be "illusory". It is submitted that the defendant Board of Education rendered a decision which is so transparent as to make review in this case illusory. In United States vs. Merz, 376 U.S. 192, 11 L.Ed 2d 629, 84 S.Ct. 639 (1964), a case specifically and directly relied upon by the Kinsella court, the Supreme Court stated:

> "Conclusory findings are alone not sufficient for the commission's findings shall be accepted by the court 'unless clearly erroneous'; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence. See United States v. Lewis, 308 F 2d 453, 458. (Emphasis added.)

The Court found no great burden being imposed upon laymen who are asked to document clearly these decisions:

> "The commissioners need not make detailed findings such as judges do who try a case without a jury. Commissioners, we assume, will normally be laymen, inexperienced in the law. But laymen can be instructed to reveal the reasoning they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do not say that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based. The path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked. Such a requirement is within the competence of laymen; and laymen, like judges, will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it." Id. 634-635. (Emphas added.)

The Board of Education decision contains only conclusions. Although the Board of Education is composed of laymen, the Supreme Court has indicated that the rendering of a decision as outlined in the Merz case and in the Kinsella case is within the competence of laymen. Finally, the Supreme Court well understood that the necessity to render a written decision would engender careful and considered analysis of the issues. The paucity of information contained in the Board of Education decision indicates a serious lack of consideration and perhaps none at all on the part of the ultimate decision-makers.

Despite a long and well documented court action, and despite a detailed and clearly defined decision by a three-judge federal panel, and further, despite procedures implemented

by the Department of Education, this defendant Board of Education has totally failed to make any showing that it understood or heeded the principle's confirmed by the court in the Kinsella decision. Based upon the events which have transpired during the past several months, this court must, based upon the Kinsella decision as reinforced and expanded in the Arnett decision, declare null and void the decision of defendant Board of Education. As a result, Mr. Kinsella must be returned to his employment with full back pay and with the same status that he had prior to the commencement of charges against him.

Dated: December 6, 1974

Respectfully submitted,

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Ira Paul Rubtchinsky, Esq.
Of Counsel

APPENDIX "A"

APPENDIX A ANNEXED TO PETITIONER'S
MEMORANDUM IN SUPPORT OF MOTION II

CENTRAL SCHOOL DISTRICT NO. 7

STATEMENT OF CHARGES AGAINST
DONALD M. KINSELLA

At an executive session of the Board of Education of Central School District No 7 of the Towns of Amherst and Tonawanda, County of Erie, State of New York, held March 5, 1973 at the Sweet Home Senior High School, 1901 Sweet Home Road, Amherst, New York in said School District the following board members present:

Dr. M. Duane Mongerson
Dewey E. Ertell
Dr. Harold L. Kall
William P. O'Donnell
Kenneth J. Rebman
Clifford J. Waterhouse

The Board of Education considered charges preferred against Donald M. Kinsella by James M. Haught by letter dated March 1, 1973, and by unanimous vote determined that probable cause exists that:

1. on February 23, 1971, immediately following a basketball game which was a District sponsored athletic event and after a victory by the basketball team, students were taking down the nets from the basket rims in the gymnasium where the game was played. One of those students was Steven Ulmer, who was standing on the back and shoulders of another student, William Forbess. Mr. Kinsella grabbed Steven Ulmer by the hair and pulled him off the back and shoulders of the other student. Mr. Kinsella then struck or grabbed Steven Ulmer on the face two or more times causing him to bleed from the mouth and nose and also causing bruises on his face. Mr. Kinsella admitted he "roughed up" the student. Although the event occurred in the evening after the normal school hours, Mr. Kinsella was acting in an official capacity as chaperone, and was being paid by the district for such services.

2. on April 30, 1970 during normal school hours Mr. Kinsella while acting in his capacity as a teacher grabbed the hair of one Audrey Brooks, a student at the Senior High School with the result that she fell to the floor.

3. on December 17, 1971, while teaching a regular gym class at the Senior High School, Mr. Kinsella pulled the hair of a student, Donald Gullo, slapped the student across the face, and threatened to "kick him in the balls."

4. the action referred to in paragraph one constituted the use of excessive physical force or excessive corporal punishment in violation of Policy and Rules 5131-1 adopted by the District on November 16, 1972, which Policy and Rules were communicated to Mr. Kinsella prior to such action. Accordingly, such action constituted "insubordination."

5. the incidents in paragraph one, two, and three were part of a pattern of conduct which indicates that Mr. Kinsella is not able to perform his duties as a teacher without the use of excessive physical force or excessive corporal punishment. That inability, together with the finding by the Board of Education and the finding of an impartial panel, empaneled pursuant to 302(a) of the Education Law, that Mr. Kinsella on February 9, 1971, engaged in conduct unbecoming a teacher indicates that Mr. Kinsella is incompetent to serve as a teacher.

(This Exhibit retyped from a duplicate of the original charges.)

BRIEF ON BEHALF OF
DEFENDANT BOARD OF EDUCATION

DOCKET 4/252
COPY
FILE 2041

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

CIVIL 1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

BRIEF ON BEHALF OF SWEET HOME CENTRAL SCHOOL (BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7) ON PLAINTIFF'S MOTION FOR SUPPLEMENTARY RELIEF

The plaintiff, by notice of motion dated November 22, 1974, and upon the affidavit of Donald M. Kinsella dated November 25, 1974, has moved this court for supplementary relief claiming non-compliance by the School Board with the order of this court dated February 19, 1974, and requests that the determination of the Board dated July 25, 1974 finding the plaintiff, Donald M. Kinsella, guilty as charged and discharging him, be vacated and the plaintiff, Donald M. Kinsella, be reinstated to his prior teaching appointment in said school district.

The issues before this court are whether or not the regulations promulgated by the Commissioner of Education of the State of New York subsequent to this court's order were properly adopted procedurally and whether or not they implement the

directives of this court's order. These issues will be treated in the brief of the Attorney General of the State of New York. There is also the further issue of whether this court has jurisdiction to hear this motion, plaintiff's counsel having conceded on oral argument that plaintiff has not availed himself of the remedies available in the courts of the State of New York, namely, an Article 78 proceeding against the School Board and/or an appeal to the Commissioner of Education. This issue will also be treated in the brief of the Attorney General. This brief on behalf of the School Board will concern itself only with the issue of whether or not the Board followed the regulations as adopted by the Commissioner subsequent to this court's order (Exhibit B) and whether or not the plaintiff, Donald M. Kinsella, was afforded due process in the proceedings leading to his dismissal. The Board contends that the order of this court dated February 19, 1974 was complied with in all respects. This court held therein that due process would be denied Donald M. Kinsella unless first, the Board based its decision on matters revealed in the transcript of the hearing before the panel only, and second, the Board render a written decision citing therein reasons for the decision based on matters contained in the record. The regulations adopted February 28, 1974 which were followed by the Board provide the two safeguards ordered by this court.

On March 13, 1974 notice of rescheduling of the teacher tenure hearing of Donald M. Kinsella was mailed by Hearing Officer William P. Bellas to Mr. Kinsella and his attorney,

Mr. Sandner. A hearing before a three-member panel was held on April 18, May 6, May 10 and May 30, 1974. Mr. Kinsella was present and accompanied and represented by counsel. Stenographic transcript of the hearing was made. The panel issued its report dated June 21, 1974 with a copy being mailed to Mr. Kinsella and his counsel. The Board rendered its written decision July 25, 1974 with copy to Mr. Kinsella and his counsel. Said decision states that the Board read the transcript of the hearing in this matter and examined exhibits placed in evidence. The Board thereafter makes three findings of fact, that on three separate occasions the plaintiff, Donald M. Kinsella, physically assaulted three different students at Sweet Home Central School. Plaintiff's counsel apparently argues that the Board learned of these three assaults from some source other than the transcript of the hearing before the panel. This is ridiculous. It seems abundantly clear from the written decision of the Board dated July 25, 1974 that the transcript of the hearing which the Board read revealed three separate incidents of excessive physical force used by Mr. Kinsella upon students, and based upon those findings the Board discharged Mr. Kinsella.

Plaintiff's counsel argues that neither the plaintiff nor his counsel was invited to present legal arguments to the Board before their decision was rendered. There is no requirement in the regulations of the Commissioner that any such legal arguments be made and secondly, this court did not order that such legal arguments be heard.

Plaintiff's counsel further argues that the written report of the hearing panel does not summarize the evidence. This is completely irrelevant because the Board in its written decision specifically refers to the three incidents which give rise to its decision.

Plaintiff's counsel further argues that the Board must have considered certain ex parte matters outside the transcript when rendering its decision. There is absolutely no evidence that any ex parte matters were considered and the decision specifically refers to the record and three incidents of physical abuse of students revealed in that record.

Plaintiff's counsel further argues that the decision does not make specific reference to the page of the transcript in which the three assaults of students were revealed. I am advised by counsel for the School Board that this transcript is 700 pages long and I respectfully suggest that plaintiff's counsel, like any other trial or appellate lawyer, can read the record for himself.

Plaintiff's counsel further insists, as he did upon oral argument prior to this court's decision of February 19, 1974, that the attorney for the School Board, Thomas David, participated in the deliberations of the Board prior to rendering their decision of July 25, 1974. The affidavit of Thomas David submitted upon this motion clearly states that he at no time participated in any deliberations of the School Board regarding Mr. Kinsella.

As special counsel for the Board of Education of

Central School District No. 7, we submit that Mr. Kinsella has been ably represented by counsel every step of the way in this proceeding and that all his constitutional rights have been fully and adequately protected and that he has had all the due process and more that any one man is entitled to.

Respectfully submitted,

OHLIN, DAMON, MOREY, SAWYER & MOOT
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Central School District No. 7
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James S. McAskill,
of counsel

Dated: December 20, 1974

LETTER BRIEF ON BEHALF
OF DEFENDANT NYQUIST

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DEPARTMENT OF LAW
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LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

MICHAEL G. WOLFGANG
ASSISTANT ATTORNEY GENERAL
IN CHARGE

January 17, 1975

FILED
JAN 20 1975
AT.....O C.....M.
JOHN K. ADAMS, Clerk

Hon. John T. Curtin
Chief Judge
United States District Court
Chambers, United States Court House
68 Court Street
Buffalo, New York 14202

Re: DONALD M. KINSELLA v. Board of Education of Central School District No. 7 of the Towns of Amherst and Tonawanda, Erie County and Ewald B. Nyquist, Commissioner of Education of the State of New York
CIV-73-187, USDC, WDNY

Dear Judge Curtin:

Please consider this a letter brief in the above-entitled matter.

Plaintiff previously sought and obtained declaratory and injunctive relief from a Three-Judge Court which held the enforcement of Education Law §3020-a to be unconstitutional in the absence of additional specified regulations.

Those regulations, 8 N.Y.C.R.R. Chapter II §82.11 Part 82, have been promulgated and plaintiff now challenges the procedure used in their promulgation.

If federal jurisdiction is present, it can be exercised only by a Three-Judge Court pursuant to 28 U.S.C. §2281. Zemel v. Rusk, 381 U.S. 1 (1965). Plaintiff seeks the enjoining of the enforcement of a statewide regulation.

A district court judge, however, may dismiss this motion on the grounds that it fails to raise a substantial federal question and that plaintiffs lack standing to sue. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) (per curiam).

Plaintiff complains only that the regulations were promulgated in excess of the authority of defendant Nyquist. In no manner does plaintiff suggest that the regulations on their face either violates the Constitution or the order of the Three-Judge Court, as indeed they do not.

Plaintiff does not allege that he has been prejudiced in any manner as a result of the procedure followed in the promulgation of the regulation, nor does he allege that any federally protected right has been violated.

Plaintiff therefore lacks standing to complain of the procedures used in promulgating the regulation in question. Massachusetts v. Mellon, 262 U.S. 477; Ex Parte Levitt, 302 U.S. 633; Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118.

Since no federally protected right is involved in the promulgation of the regulation, this Court is without subject matter jurisdiction in the first instance.

The appropriate forum for plaintiff to challenge the state procedure for the promulgation of regulations, is the state court.

In fact the attorneys for plaintiff have already done so in the Matter of Hodgkins v. Central School District No. 9, 78 Misc. 2d 91 (April 1974). The Supreme Court of New York, Broome County (FISCHER, J.), held that the regulations in question were promulgated in full complaince with New York Law. Plaintiff has filed a notice of appeal but has chosen not to perfect that appeal as of this date.

Plaintiff urges that this Court has continuing jurisdiction pursuant to 28 U.S.C. §2202.

The above statute, however, merely gives a court continuing jurisdiction to grant injunctive relief following the granting of declaratory relief pursuant to 28 U.S.C. §2201. In the case at bar, injunctive relief was granted by the Three-Judge Court. Therefore, 28 U.S.C. §2202 does not apply in the case at bar.

The statute relied upon by plaintiff has been repeatedly held not to confer jurisdiction upon a court where jurisdiction would not otherwise have been present. Fifth Ave. Peace Parade v. Hoover, 327 F. Supp. 238 (D.C.N.Y. 1971); Jarrett v. Resor, 426 F. 2d 213 (9th Cir. 1970); U.S. v. Smith, 393 F. 2d 318 (5th Cir. 1968).

The provisions of 28 U.S.C. §2202 do not confer

jurisdiction upon a court where original jurisdiction would not have been present.

For the above reasons, defendant Nyquist respectfully requests that this Court enter an order denying the motion in all respects.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By:
Douglas S. Cream
Assistant Attorney General

DSC/kmj

cc: Emanuel Tabachnick, Esq.
James S. McAskill, Esq.
Thomas L. David, Esq.

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OFFICE OF GENERAL COUNSEL
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REPLY MEMORANDUM OF LAW
ON BEHALF OF PETITIONER

IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

CIV-1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

REPLY MEMORANDUM OF LAW ON
BEHALF OF THE PLAINTIFF IN SUPPORT
OF HIS MOTIONS FOR SUPPLEMENTARY RELIEF

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Ira Paul Rubtchinsky
Of Counsel

TABLE OF CONTENTS

		Page
Preliminary Statement		1
Point I -	NO EXHAUSTION OF STATE REMEDIES IS REQUIRED IN THIS CASE	4
Point II -	LACK OF JURISDICTION OVER THE SUBJECT MATTER	8
Point III -	PROCEDURES FOLLOWED IN CONNECTION WITH THIS MATTER STILL FAIL TO COMPLY WITH DUE PROCESS	11
Point IV -	ACTION TAKEN BY THE DEFENDANT COMMISSIONER OF EDUCATION PURPORTING TO COMPLY WITH THE ORDER OF THE THREE-JUDGE FEDERAL PANEL IS NULL, VOID AND OF NO EFFECT	14
Conclusion		28

IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

CIV-1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY AND EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

REPLY MEMORANDUM OF LAW ON BEHALF OF THE PLAINTIFF IN SUPPORT OF HIS MOTIONS FOR SUPPLEMENTARY RELIEF

Preliminary Statement

Plaintiff has brought two separate motions before this court. Motion I explores the state action taken against Mr. Kinsella subsequent to the time when the three-judge federal panel of this court rendered its decision during February, 1974. The foundation upon which plaintiff requests relief is contained in the factual pattern which relates to the adoption of the rules and regulations by the

Commissioner of Education. It is urged that the adoption of the regulations was not accomplished in accordance with the laws of the State of New York and thus did not comply with spirit and meaning of the three-judge federal panel's decision or the permanent injunction which that decision imposed. As a result, all action taken since the decision has been rendered should be declared void and of no effect since such action violates the mandate of the three-judge panel.

With respect to the hearing procedure undertaken against Mr. Kinsella, the court is requested to review the action of the defendant board of education. These actions include gross deficiencies in procedural due process as outlined by the courts. By acting as it did, the board of education defeated the spirit and intent of the three-judge federal panel's determination: There is no proof that the board decision is based exclusively upon the evidence which was placed before the tenure hearing panel; there is no proper summarization of evidence or other bases in the record (which was in excess of 700 pages) upon which a proper or adequate appeal to another tribunal could be founded; the board is not an impartial decision maker; the affidavit by the Board's attorney does not foreclose ex parte communications with Board members nor does it preclude input into the final decision itself (see paragraph 4 of David affidavit) among other procedural defects.

The responses of the defendants attack the petition by claiming.

1. The failure to exhaust state remedies,

2. The lack of subject matter jurisdiction.

In addition, the defendant board asserts that there was regularity and compliance in the tenure hearing procedure.

In this reply memorandum of law, plaintiff will discuss three areas upon which the defendants rely to attack those motions for supplementary relief. Point I will discuss the exhaustion of state remedies. Point II will review jurisdiction over the subject matter, and Point III will be concerned with the regularity or irregularity of compliance with the procedures of the tenure hearing statute.

POINT I

NO EXHAUSTION OF STATE REMEDIES IS REQUIRED IN THIS CASE.

Both defendants argue that there is no direct constitutional attack on the rules and regulations promulgated for the Commissioner of Education with respect to the constitutional sufficiency of those rules and regulations, and, therefore, plaintiff should not be in this court. Plaintiff responds by stating that primary reliance is placed upon the federal statute which allows him to once again return to federal court in order to obtain such relief as is necessary to effectuate the decision of the federal court. (See, for example, the Court's discussion of pendent jurisdiction Hogans v. Lavine (1974), 415 U.S. 528, 545.) The avoidance of unnecessary duplication of legal action with attendant time consumption and expense both on the part of the courts and the individual litigant should be a paramount factor in this court's decision as to whether it will entertain plaintiff's request. No prejudice has been shown by defendants who presumably would have to prepare the same defenses if action were brought in state courts.

Jurisdiction was implicitly retained by the federal court because the injunction states that it remains in full force and effect until such time as appropriate legislative or administrative action was taken. It also must be presumed

that the three-judge federal panel anticipated legal and valid state action to be taken to remedy the defects found by the federal panel. The failure to take legal and proper action must also be considered a direct violation of the federal panel's injunction. To do otherwise, would be to imply that the federal panel was granting permission to the state agency to promulgate regulation without proper authority to do so. Thus, in order to make a determination as to whether there has been complaince with the injunction, the court must also determine if appropriate and legal state action has been taken in accordance with the terms and conditions of the injunction.

Mr. Kinsella originally came into this court seeking relief from an unconstitutional statute. At that time this court expressly stated that exhaustion of state remedies would be unnecessary under federal court doctrine. It should not be necessary at this time to exhaust state remedies when plaintiff comes into this court stating that subsequent unlawful state action has been taken which has the ultimate effect of continuing the same denial of constitutional rights as originally complained of. If this court finds that no lawful state action has been taken pursuant to its order, the court must find that denial of constitutional rights continues.

The reason plaintiff returned to this court is to get this court's judgment as to Mr. Kinsella's constitutional rights

based on an amended factual pattern which has been caused exclusively by this court's prior decision. To require Mr. Kinsella to go into state court and litigate the question of the authority of the Commissioner of Education to promulgate rules and regulations (in effect, obtaining some form of intermediate relief) rather than returning to this court and obtaining swift, sure, and ultimate relief, is to require needless duplicative effort. In any event, the time to go into State court or to appeal to the commissioner has now expired. CPLR Article 2; 8 N.Y.C.R.R. §275.16.

In civil rights cases, there is no complusion to utilize state courts to decide intermediate questions yet leaving the ultimate issues for a federal forum. Such a process is wasteful, duplicative and unnecessary. (See Carr v. Thompson (W.D.N.Y., 1974) 384 F. Supp. 544. In Drexler v. Southwest DuBois School Corporation (7th Cir., 1974) 504 F. 2d 836, the court stated:

> "But, given the broad and generalized nature of the concept of arbitrary governmental action, it is possible that in many section 1983 actions the alleged constitutional deprivations might be found to be a violation of state law if only a plaintiff would present the claim to a state court. Some small amount of federal-state friction might be eliminated by such a requirement. However, if elimination of federal-state friction were the only criterion, a plaintiff should also be required to submit his federal constitutional claim to the state courts in the first instance. Indeed, in this case one of the constitutional issues raised is the question of arbitrary and capricious action. We find that ordering plaintiff

> to litigate the question of "arbitrary action" in the state courts before either of these constitutional issues will be considered is, in effect, requiring him to first litigate the "same claim" in the state courts. Such exhaustion is not necessary in a section 1983 action." (Id., 839.)

The ultimate claim in Mr. Kinsella's case is not that the rules and regulations were improperly promulgated but that in the promulgation of such rules and regulations by the defendant Commissioner of Education and the Board of Regents, pursuant to order of this court, there has been a continuation of an illegal state action which deprives the plaintiff of his rights. That is the only claim that should be litigated. It is absurd to assert that although a federal court has the equity power to issue an injunction that it lacks equity power to enforce that injunction, where as here, plaintiff comes into this court seeking the further relief with respect to the injunction already issued.

POINT II

LACK OF JURISDICTION OVER THE SUBJECT MATTER.

It is plaintiff's contention that the lack of jurisdiction claim is fully met in the plaintiff's memorandum of law accompanying Motion I. The argument of the Commissioner of Education that the promulgation of rules and regulations is not within this court's jurisdiction is the result of an exercise in false logic. This federal court has the jurisdiction to determine issues extending both to federal and other questions where federal jurisdiction is found. Sterling v. Constantin (1932) 287 U.S. 387, 393-394.

All of the arguments interposed by the defendants here with respect to jurisdiction may have validity, but only in a situation where parties come into the court for the first time! The court has already indicated in its prior decisions in this case that there is federal jurisdiction to scrutinize state statutes, rules, and regulations in this matter. Thus, this court must treat the instant application as if the injunction granted by the court had a phrase concerning "continuing jurisdiction" incorporated within it. By doing so, the same jurisdictional principles attach here as they did to the original action, and this court must decide the issues presented before it.

Plaintiff states that there has been no valid state action to remedy the defects found by the three-judge panel

in Education Law §3020-a. Having said only that, the plaintiff has once again placed before the court all the issues he originally placed before the court. The defendant must now come forward and indicate how their lawful actions have complied with the three-judge panel decision. It is submitted that they cannot do so because there is an improper exercise of state power and, therefore, the injunction remains in full force and effect.

In Sterling v. Constantin, supra, a case with great similarity to the instant case, the Governor of Texas had imposed certain oil well restrictions upon the plaintiffs and had enforced them by martial law. The federal courts, presented initially with a due process question (deprivation of property), found jurisdiction to consider factual issues:

> "Having thus found the facts, the District Court, maintaining its jurisdiction, examined the provisions of the Constitution and statutes of the state to ascertain whether they had conferred upon the Governor the power he had assumed to exercise. The court concluded that not only was no such affirmative authority conferred, but that express provisions of the Constitution withheld such power...." Id. p. 392.

Although the Supreme Court did not find it necessary to decide the case on the issue of validity of the actions taken by the Governor, it did note:

> "As the validity of provisions of the state Constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. Stratton v. St. Louis Southwestern

R. Co., 282 U.S. 10, 51 S. Ct. 8, 75 L. Ed. 135. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191, 29 S. Ct. 451, 53 L. Ed. 753....[other cases cited]." Id. 393-394.

The term "every question involved" includes the question of legality of state action when, as in this case, the invalidity of the state action has an adverse effect on Mr. Kinsella's rights.

As the Court noted in a similar respect in Sterling v. Constantin, supra:

> "Complainants had a constitutional right to resort to the federal court to have the validity of the commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in the instance was to maintain the federal court in the exercise of its jurisdiction, and not to attempt to override it; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared." Id., p. 404.

The defendants here also had a duty to see that the rights of the plaintiff as judicially declared by this Court not be obfuscated or otherwise obstructed or confused.

POINT III

PROCEDURES FOLLOWED IN CONNECTION WITH THIS MATTER STILL FAIL TO COMPLY WITH DUE PROCESS.

The three-judge federal panel found that the procedures under the Education Law were lacking and did not comply with due process. The specific defects found by the court included the failure to have the board's decision based exclusively upon the hearing proceedings and the failure to even have the hearing proceeding presented before the board of education.

Mr. Kinsella was not given an opportunity to present his case before the board of education but, instead, the presentation was made before a hearing panel. The prior brief in support of Mr. Kinsella (motion #2) indicates the failings and shortcomings of the procedures followed by the board and as adopted by the Commissioner of Education. In Buck v. Board of Education of the City of New York et al., (E.D.N.Y. 71-C-954, decided December 2, 1974), ____ F. Supp. ____, Judge Judd states:

> "Due process of law should extend not only to the hearing but to the decision. It is an unreal protection to deprive an employee of participation at the crucial point where the decision whether to fire or not to fire is made." (Page 21.)

Plaintiff maintains that the record does not indicate at any point that the board of education based its determination exclusively on the hearing transcript. Although (as

noted in the brief submitted on behalf of the board of education) there is a recitation in the determination of the board of education that the members of the board read the hearing transcript, there is neither an affidavit nor other proof indicating that the hearing transcript was the exclusive source used by the board in reaching its determination. In addition, the determination does not specifically indicate or relate its findings and their relationship to the charges brought or to the determination of the hearing panel.

The question of multiplicity of roles, originally dismissed by the three-judge federal panel, is raised once again for this court's determination. In the case King v. Caesar Rodney School District et al., (D. Del. 1974) 380 F. Supp. 1112 the court, presented with an impartiality question, stated:

> "The question before the Court, therefore, is not whether [the plaintiff] was entitled to an impartial tribunal, but whether the Board so thoroughly investigated the facts of [his] case before the termination hearing that it could not have conducted the impartial hearing to which [he] was entitled." Id. 118.

It is submitted to this court that the intimate relationship that the Board had with this matter precluded fairness or impartiality.

The Supreme Court decision in Arnett v. Kennedy 416 U.S. 134 (1974), decided subsequent to the three-judge court's decision herein, and to which that court alluded in footnote 5 of its opinion, also casts considerable doubt on the

Kinsella court's holding in this regard. (See footnote 5 of Justice Powell's opinion, Justice Marshall dissent had the dissenting views of Justice White.) A majority of the Court clearly found impartiality to be a critical factor in such cases. Thus there is no constitutional question remaining in this respect. See Goosby v. Osser 409 U.S. 512 (1972).

It is important to note that despite the protestations of the attorney for the board of education (see affidavit of Thomas L. David dated and sworn to on December 5, 1974), that neither he nor his law partner David C. Laub "counselled or took part in the deliberation of the Board of Education in connection with the plaintiff's dismissal", the next two paragraphs (paragrahs 6 and 7) go on to conclude that those very deliberations and the ultimate determination of the board of education complied with the law and that the decision was based upon the transcript and exhibits. These assertions indicate that the closeness of the relationship between attorney and client as well as the intimate relationship which the board had with the entire dismissal process defeated Mr. Kinsella's right to a fair and impartial tribunal in the decision of his case.

With respect to the procedures followed by the hearing panel and the board of education in connection with the dismissal of Mr. Kinsella, it is submitted that they did not comply with the requirements of due process and further that there was no compliance with the injunction of the three-judge federal panel.

307.

POINT IV

ACTION TAKEN BY THE DEFENDANT COMMISSIONER OF EDUCATION PURPORTING TO COMPLY WITH THE ORDER OF THE THREE-JUDGE FEDERAL PANEL IS NULL, VOID AND OF NO EFFECT.

New York Education Law §3020-a was declared unconstitutional by a three-judge federal panel in this case, (378 F. Supp. 60). The court found the statute to be constitutionally defective since school boards were not required by the statute to set forth reasons for their decisions, thereby failing to provide a reviewing court with an adequate record to review. The court did not instruct the Defendant Commissioner of Education as to the precise action necessary to remedy the constitutional defects, but enjoined the school board and the Commissioner of Education from its enforcement:

> "...until such time as appropriate administrative or legislative action is taken to remedy the defects in the board procedures here involved." Kinsella v. Board of Education 378 F. Supp., 60.

Obviously if actions taken subsequent to the imposition of the injunction are not in compliance with both its terms and the mandates of applicable law, the injunction ordered by the three-judge panel must still be in force today. Accordingly, if Commissioner of Education acted in excess of his authority, the subsequent continued prosecution of the plaintiff pursuant to New York Education Law §3020a

must then be considered void as against these plaintiffs. See Sterling v. Constantin, supra; Chandler v. Wallace Chandler, Inc., 365 Mich. 613, 113 N.W. 2d 901.

In order for there to be "appropriate" action as called for in the court order, the procedures followed in promulgating the corrective rules and regulations had to be lawful procedures. It is the purpose of this point to analyze and discuss the requirements for the lawful enactment of administrative rules and regulations. Apparently, in response to the order of the three-judge federal panel, the State of New York has attempted to act through the Defendant Commissioner of Education by imposing the rules and regulations which were adopted subsequent to the court decision in this case. It is the plaintiff's contention that the newly promulgated rules and regulations were not properly promulgated and put into effect, and as a result, §3020-a, Education Law remains unconstitutional, void and of no effect.

It is axiomatic that rule making authority does not include the right to promulgate regulations which conflict with either the statute or clearly defined statutory policy. As noted in Feickert v. McGoldwick, 119 N.Y.S. 2d 301 (1953):

> "Though respondent has the right under the provisions of the law to promulgate regulations carrying into effect the law itself, no authority is vested in the respondent to make such regulation or interpret the law not in harmony with the intention of the statute.

Whitmarsh v. Farnell, 273 App.Div. 584, 78 N.Y.S. 2d 782, reversed on other grounds 298 N.Y. 336, 83 N.E. 2d 543. Nor can the respondent by interpretation or opinion, as in Opinion No. 41, bind the court where there appears no doubt as to the meaning of the words used in the regulation or statute, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700."

It is Plaintiff's contention that the Legislature did not intend by the enactment of §3020-a to invest in the Commissioner the type of authority to promulgate regulations such as the ones at issue. A careful examination of the Education Law and the respective roles of the Commissioner and boards of education compels the conclusion that the Legislature did not intend that a board of education be bound to set forth factual findings based upon evidence elicited before the hearing panel. In the absence of any appropriate state action being taken in accordance with the three-judge injunction, that injunction remains in force.

The New York Legislature made specific provisions in 3020-a(3) of the Education Law as to the Commissioner's authority vis a vis the hearing, while at the same time not setting forth specific duties for the Commissioner in the post-hearing phase. This latter omission was not an oversight, but was deliberate. The statute was so drafted because the Legislature intended that the board of education would control the post-hearing process, with the Commissioner merely serving as a conduit for transfer of the hearing

panel's report to the board of education.*

An examination of the authority of the Commissioner and a board of education under the Education Law begins with the source of the Commissioner's authority. As noted in the Plaintiff's earlier brief (Motion I), the Commissioner and the Board of Regents are officers of and creatures of the New York State Constitution (Article 5, §4).

> "The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department."

The powers of the Regents as a corporate body are contained in New York State Constitution, Article 11, §2:

> "The corporation created in the year one thousand seven hundred eithty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents." (Emphasis added.)

The Court of Appeals has stated:

> "A written constitution is the fundamental expression of the sovereign will. Under our form of government that sovereigh will resides in the people. A written constitution is not only the direct and basic expression of the sovereign

* Compare William Jerry v. Board of Education of the City of Syracuse et al., (No. 464, December 23, 1974), ____ N.Y. 2d ____.

> will, but is the absolute rule of action and decision for all departments and offices of government in respect to all matters covered by it, and must control as it is written until it shall be changed by the authority that established it." Wright v. Hart, 182 N.Y. 330, 333 (1903).

With knowledge of the constitutional provisions in hand, attention must be turned to the Consolidated Laws of New York which embodies all of the legislative statutes. By reason of the constitutional grant of authority quoted above, the legislative mandates define the absolute limit of

As noted in Brief I, the Commissioner has the power to adopt rules and regulations subject to the Regents approval. That power is spelled out in Education Law, Article 7 (§§ 301-314) and includes the power to:

1. "...enforce all general and special laws relating to the educational system of the state..." Education Law §305(1).

2. "...prescribe regulations governing the licensing of the teachers [of certain schools]..." Id. §305(2).

3. "...annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher..." Id. §503(7).

4. "make regulations concerns the courses of study and training of teachers" Id. §305(12).

5. "execute such further powers and duties he shall be charged with by the regents." Id. §305(18).

The Commissioner also possesses certain powers under the Education Law with regard to boards of education including the following:*

1. "Whenever it shall be proved to his satisfaction that any trustee, member of a board of education... is a member of an organization listed as subversive...or has been guilty of any wilful violation... after a hearing....remove such school officer from his office." Education Law §306(1).

2. "...may also withhold from any district or city its share of the public money..." Id. §306(2).

3. "...He is charged with general supervision of their boards of education...." Id. §309.

As for boards of education they also possess certain powers under the Education Law. These powers are defined in the Education Law and vary depending on the type of school or the size of the city and include powers and duties with regard to the following school districts:

§1709 - Union Free School District
§1804 - Central School District
§1903 - Central High School District
§2503 - City School Districts of Cities with less than one hundred twenty five thousand inhabitants.
§2554 - City School Districts of cities with one hundred twenty five thousand inhabitants or more.
§2590(e) and (g) - New York City Community School District System

* This list does not include Title VI of the Education Law (Special Schools and Instruction), since the Commisioner is granted broader powers with respect to these institutions.

Although the above provisions are not identical they have in common a number of duties which the boards of education are authorized to exercise, including:

1 - The authority to hire various employees, including teachers.

2 - The authority to take action which affects the physical operation of the schools such as, purchase of supplies, insurance, text books and other various equipment.

3 - The authority to prescribe general courses of study.

4 - The authority to establish rules and regulations concerning order and discipline in schools.

It is clear from an examination of the above provisions that the Legislature intended that the actual day to day operation of the schools be left to the individual boards of education, with the Commissioner exercising general supervision over the schools (See §305(a) Education Law). Moreover, the board of education's daily operation includes general supervision over teachers. This supervision extends from the hiring to the firing of teachers and except for the Commissioner's authority to issue and annul a teacher's certificate (See §3006 and §305(7) of the Education Law respectively), the board of education is charged by the Legislature with supervision of a tenured teacher's performance.

An administrative body may exercise its rule-making power only when the power has been specifically delegated by

the legislature.* Rosenbluth v. Finkelstein (1950) 300 N.Y. 402, 405; 1 N.Y. Jur. Administrative Law §105. To allow otherwise, that is, to allow an administrative agency to promulgate rules and regulations in the absence of legislative direction, would be a violation of the basic delegation of power from the people to the government. U.S. Constitution Article 1, §1; New York Constitution, Article 3, §1. Thus, a legislative body, empowered through a written constitution authorizing the body to carry out the law-making process, cannot allow the administrative body to usurp the law-making function although it may make certain delegations of responsibility. The implication in all of this is that the legislature must set forth standards or tests before it can legally and constitutionally empower a state body or agency to act in a quasi-legislative role of rule-maker. The courts have continually declared laws unconstitutional where those laws allow for the usurpation of legislative functions by other state officers or agencies.

> "The statute before us is nothing less than an attempt to empower an administrative officer, the State Commissioner of Education, to register and license, or refuse to register and license, private schools, under regulations to be adopted by him, with no standards of limitations

*Furthermore, certification requirements may not be utilized by a board of education to erode protections afforded by the tenure statutes (See Lynch v. Nyquist, 41 A.D. 2d 363, 343 N.Y.S. 2d 179, aff'd 34 N.Y. 2d 588, 354 N.Y.S. 2d 948).

> of any sort. The Legislature has not only failed to set out standards or tests by which the qualifications of the schools might be measured, but has not specified, even in most general terms, what the subject matter of the regulations is to be." Packer Collegiate Institute vs. University of the State of New York (1948) 298 N.Y. 184, 189.

While specifics and details may be delegated to the state agency with rule-making authority, the Legislature "must at least furnish those administrators with 'rule and principals' for guidance." See Packer, supra 298 N.Y., 190.

Where those guidelines do not exist, scrutiny to determine the outer limits of authority may be given to other areas of the law. (See Packer, 298 N.Y., 190.) Where, however, the Legislature has made its outer limits clear in the statute, it is inconceivable for a state functionary such as the Commissioner of Education to exceed those limits.

In Packer, the court found that there were no limits set by the Legislature in the statute. The court then noted the consequence of such a carte blanche being expressly or impliedly bestowed upon the Commissioner of Education.

> "However, an examination of those regulations is illuminating since they show, we think, that the commissioner, left without legislative guidance, proceeded to legislate, broadly and in many different areas....A comparison of those regulations with the bare and meager language of the statute forces the conclusion that, however good or bad the commissioner's rules may be, they were not controlled, suggested or guided by anything in the statute." Packer, supra, 298 N.Y. 191.

In the Packer case no standards existed, in the instant case an examination of the provisions of the Education Law which relate to teachers (§§3001-3113) and in particular §3020-a amply demonstrate that the Legislature set forth well defined guidelines which the Commissioner and the Board of Regents may not exceed. (See Footnote I of the Three-Judge Court opinion, particularly sections 3020-a(s) and (4).)

Furthermore, it is submitted that the Defendant Commissioner exercised his rule making power in an area of the Education Law in which boards of education have primary responsibility. As was examined in more detail above, the hiring and firing of tenured teachers is the board of education's responsibility. The Commissioner's authority extends to granting and annulling of certification to teachers.

It would seem that had the Legislature intended that the board of education be provided with a copy of the transcript of the tenure hearing and to set forth reasons and factual basis based upon the record of proceedings it would have made these provisions explicit. The better answer lies in a recent Court of Appeals decision In the Matter of William Jerry vs. Board of Education of the City of Syracuse et. al, No. 464, December 23, 1974, ____ N.Y. 2d ____, where the New York Court of Appeals faced the question of whether the intent of the Legislature to permit boards of education to suspend tenured teachers without pay could be inferred from an indirect reference to supervision without pay in

317.

§3020-a(4). In refusing to draw such an inference the Court stated:

> "To the assertion that one should infer from this phrase an intention on the part of the Legislature to confer authority to withhold, we rejoin that had there been such an intention the easy and normal manner of its expression would have been to include an explicit, appropriate provision therefor in subdivision (2)."

It would appear that this reasoning would apply with equal force to the instant case. Furthermore an examination of those sections of the Education Law where the Legislature has provided for revocation and/or disciplinary proceedings in various professional practices over which the Board of Regents has supervisory authority shows that the majority make explicit reference to the reviewing body receiving a copy of the transcript and making findings of fact.

Title VII of the Education Law in §§6501-7713 contain the provisions that regulate the various professions in New York State. Listed below are the sections which deal with revocation and/or disciplinary proceedings and a statement as to whether or not there is an explicit provision for the reviewing body (either the Board of Regents or Department of Education)* to receive a copy of the transcript upon which to base their factual findings:

* There is one exception, in that under §6823 the State Board of Pharmacy is the reviewing body.

	Transcript Provided to Reviewing Body
§6515(4) (Physician or Osteopath)	Yes
§6515-a(6) (Physiotherapist)	Yes
§6581(4) (Practice of Massage)	Yes
§6613(2) (Dentists)	Yes
§6712(2) (Veterinary Medicine)	No
§6804(2) (Revocation of Licenses Pharmacy)	No
§6823 (Penalties--Pharmacy)	Yes
§6911(3) (Nursing)	Yes
§7011(4) (Podiatry)	Yes
§7108(3) (Optometry)	No
§7210(2) (Engineering)	Yes
§7308(2) (Architecture)	Yes
§7406(3) (Certified Public Accountants)	Yes
§7607(2) (Psychology)	No
§7707(2) (Social Work)	No

As can be seen from the above compilation in eleven of the 16 professions regulated by the Board of Regents it is specifically provided that the reviewing body be given a copy of the transcript of the proceedings. In the other five professions although there are specific provisions for the holding of a hearing at which a person has the right to call witnesses and cross examine witnesses, there is no requirement that the reviewing body receive a copy of the transcript,

but rather as in §3020-a(4) it is only required that the reviewing body receive a copy of the findings and recommendations of the committee or body that conducted the hearing.

Although the Board of Regents and the Commissioner of Education have promulgated regulations for the professions (See 8 N.Y.C.R.R.) there are no provisions similar to the ones in issue in the instant case which would require that a transcript be provided to the reviewing body in a revocation or suspension proceeding or that a decision be based on said transcript.

The Legislature's failure to make specific provision in §3020-a(4) for providing a transcript to boards of education upon which they could base their decision when considered in conjunction with their specific requirements in the area of the professions compels the conclusion that the Legislature did not intend to require that a board of education be provided with a transcript.

This conclusion is bolstered by the wording of the statute. The statute is quite clear. The Commissioner may establish rules and regulations only in connection with the conduct of the hearing. The statute does not say that the Commissioner can establish rules and regulations with respect to the entire procedure under Education Law §3020-a. The Legislature gave no indication that it intended to confer upon the Commissioner of Education any powers other than

those expressly enumerated as ministerial powers as set forth above, as well as the one specific grant of discretionary power with respect to the conduct of only the hearing authorized under New York Education Law §3020-a(3).

It would appear that the grant of power does not appear in §3020-a(4) because the Legislature considered it complete. If they had intended that boards of education be provided with a transcript upon which to base their decision they would have said so as they did in other areas of the Education Law.

That such was the Legislature's intent seemed clear to the court in Kinsella when it accepted the decision in LeTarte v. Board of Education, 65 Misc. 2d 147, 316 N.Y.S. 2d 781, that the panel decision was advisory in nature (378 F. Supp. 54, 59).

The legislative intent is clear and the Commissioner of Education is statutorily powerless to change that intent.

In the light of §3020-a(3) and (4) the amendments to the regulations (8 N.Y.C.R.R. §82.10(h) as amended and 8 N.Y.C.R.R. §82.11), are invalid. The legislature has not amended the law and thus the decision and injunction issued by the three-judge court is still effective and all action with respect to this tenure hearing is invalid.

321.

CONCLUSION

The plaintiff respectfully requests this court to re-affirm the injunction issued by the three-judge federal panel and further that this court declare null and void the action taken by the board of education and the Commissioner of Education that the court restore Mr. Kinsella to his position as a teacher in the Sweet Home School District with full pay and benefits.

Dated: January 31, 1975

Respectfully submitted,

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Of Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

DONALD M. KINSELLA,

Plaintiff,

-v-

CIVIL DOCKET
NO. 1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, etc.,

Defendants.

* *

Proceedings held before the HON. JOHN T. CURTIN, United States District Judge, in Part I, United States Court House, Buffalo, New York, on February 25, 1975.

APPEARANCES: BERNARD F. ASHE, Esq., Attorney for the Plaintiff; IRA P. RUBTCHINSKY, Esq., of Counsel.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Attorney for the Defendant EWALD NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK; DOUGLAS S. CREAM, Assistant Attorney General, of Counsel.

H. T. NOEL & E. F. KNISLEY
OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE COURT: I believe Mr. McAskill did not desire to be here, Mr. Cream, or don't you know?

MR. CREAM: I don't know, your Honor.

THE COURT: Good afternoon.

MR. ASHE: Good afternoon, your Honor.

THE COURT: I am sorry. I hope the injury isn't serious.

MR. ASHE: Well, it is not as serious as it could have been, your Honor, and I am thankful for that, but it did not occur in an exotic fashion which also didn't help it.

THE COURT: I have the briefs here. Is there anything further you want to say in regard to this?

MR. ASHE: Well, your Honor, there are a couple of things that I think I would like to highlight with respect to this case. This is a case where we are seeking supplementary relief in connection with a three-judge court decision which enjoined enforcement of a state statute pending the adoption of appropriate administrative or legislative, -

I am sorry, pending the taking of appropriate administrative or legislative action to remedy the defects the court found in the statute.

It is our position that with respect to what has transpired with the plaintiff since the time of the court's decision that the dangers which we were concerned about at that time have very clearly revealed themselves in what has transpired subsequent to the court's opinion, the adoption or alleged adoption of regulation by the state; the continuation of the hearing proceeding in which Mr. Kinsella was charged and ultimately dismissed by the Board.

The court in the three-judge decision was very much concerned with the question of having a reviewable record to be reviewed in the event that the individual sought to review the action taken by the Board of Education. Referring specifically to the opinion and I am reading from the official report of the opinion at Page 59 and 60, the

court says, "The statute does not require that the School Board's decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceeding even be sent to the School Board, although it has been represented at oral argument that the School Board may if it so desires order the transcript", and then the court emphasizes this fact, "While the School Board does not receive a hearing report", I am sorry, "While the School Board does receive a hearing report which contains the findings and recommendations of the panel, that report does not contain even a summary of the evidence elicited at the hearing". I think if you look at the affidavits which have been filed in this proceeding, and you look at the panel decision which is appended to the affidavit of myself as Exhibit G, I think it is very clear just from a cursory reading of that panel finding or recommendation, if I may help the Court in finding that

particular document, and it might help to label the two motions to coincide with our brief. The one that has motion for supplementary relief at the very bottom of the first page is Motion 1, and is the one based on my affidavit. The other one is Motion 2.

THE COURT: All right.

MR. ASHE: And I am referring to Exhibit G which is attached to Motion 1. I think a cursory reading of Exhibit G clearly reflects that there is no summary of the evidence elicited at the hearing. There is no way of determining what the panel based its conclusions upon.

THE COURT: They had a transcript.

MR. ASHE: They had a transcript, yes, but then no findings and no credibility resolutions. There is no reference to any of the evidence in the transcript. There is nothing in the panel's findings which in any way [illegible] to that particular transcript.

I think also it is important to recollect that the Court found in its

prior decision that the panel decision was not binding on the Board of Education in any event. It adopted, - it accepted the state court's opinion in this regard that the panel's decision was purely advisory.

If you look likewise at the decision of the Board itself, which is Exhibit G, - I mean Exhibit H, to that same affidavit, it is clear again that the admonition of the court with respect to what was required of the Board itself in rendering its decision has not been complied with in this case and the court in its decision stated thusly. It said, "Furthermore, the problem is exacerbated by the fact the School Board is not required to render a written decision setting forth its reasoning and the factual basis for its decision". I think a cursory reading of Exhibit H clearly reflects that that particular concern of the court still has not been met.

The court in its opinion also made a reference in a footnote to a decision

that was pending before the United States Supreme Court. In its footnote which is Footnote 4 of that opinion, the court makes reference to Phillips vs Kennedy which was ultimately decided by the United State Supreme Court under the name Arnett vs Kennedy and the court noted that the application of its decision would have to be with deference to the court's decision when handed down. It is our position that Arnett expands upon the court's decision as it was rendered by the three-judge court to the extent that it requires, in our view, a reconsideration of the court's position with respect to the issue of impartiality of the Board itself.

The three-judge court indicated that the admixture problem which we raised at that time did not per se constitute a basis of finding that the Board was not impartial. However, I think a reading of Arnett, particularly the opinions of Justices Powell, the dissenting opinion of Justice Marshal for himself and Justice

Brennan and the dissenting portion of Justice White's opinion clearly reflect that in their view the issue of impartiality in this kind of a proceeding is extremely important.

I would like to make specific reference to a couple of portions of that opinion, of those opinions, I should say. Justice Marshal, which, - who is writing a dissent, made the following comment, "A discharged federal worker in the competitive service is in fact guaranteed a full evidenciary hearing before an impartial decision maker whose report is entitled to considerable weight," and at that point there is a footnote, at which point Justice Marshal says, "The dischargehed employee is entitled to a full trial-type proceeding before a single examiner who may not occupy a position directly or indirectly under the jurisdiction of the official who proposed the dismissal or who bears ultimate responsibility for the decision. The examiner's decision is afforded substantial

weight. If it is rejected, the rejection must be accompanied by a full statement of reasons that is subject to review". I would submit that under the statute which the court was considering, under the regulations that have been adopted, under the facts of this case as it is presently constituted, there has been no such impartial decision maker nor any such impartial decision.

With respect to Justice Powell in replying to a comment made by Justice White, he states in Footnote 5 of his opinion, "My Brother White argues that affirmance is required because the supervisory official who would have conducted the preremoval hearing was the object of slander that was the basis for the employee's proposed discharge. He would conclude that this violated the statutory requirement of an impartial decision maker. I find no such requirement anywhere in the statute or in the regulations, nor do I believe that due process so mandates at the preremoval

stage. In my view the relevant fact is that an impartial decision maker is provided at the post removal hearing where the employees' claims are finally resolved", and it is submitted that it is at the Board level that the employee's, - the question of an employee's discharge is finally resolved by a Board of Education.

Now, Justice White speaks rather lengthily of the impartiality concept in his opinion. However, in his view he would have had applied the impartiality standard even to the preremoval stage. He would have found that the particular officer who discharged Mr. Kennedy was in fact not impartial and therefore that the preremoval suspension in the Arnett case was in and of itself a violation of due process so that there are clearly six justices of the court that would apply a standard of impartiality at the ultimate hearing that a public employee would nave with respect to his discharge. I think this is important and very

critical.

For example, under the scheme that presently exists, there is no way that the panel's findings can be challenged before the Board provided either by statute or by regulation.

Additionally, if the panel does not write a decision with reference to the facts as they heard them resolving credibility resolutions where they may exist, the individual who is being charged is in no position to know on what the panel is basing whatever findings and recommendations it may make.

The Board who did not sit and did not hear the testimony is not in a position to make these credibility resolutions. It has nothing but a cold record to deal with. It does not have the benefit of the positions of the parties being explained to it or before it. I think probably the analogy that I am most familiar with that I might like to analogize this to is that I would say that the panel's decision is

to some extent similar to what a trial examiner's decision is before the National Labor Relations Board in that the Board would sit in somewhat the same posture as the members of the National Labor Relations Board in considering the facts in evidence that comes before them with respect to the record and I think it is very clear, for example, that the National Labor Relations Board will not disturb credibility resolutions unless they are patently incorrect which the Board has found to be very rare, and their reason for doing so is that they were not there, they did not hear the testimony, they did not see the demeanor of the witnesses, so they have no basis for making this determination. I think the same is true with the Board of Education here.

I think it is also important as several recent cases have suggested, that the concept of due process includes a right on the part of the individual to participate at that decision-making level. There is a case which was decided on

December 2nd by Judge Judd of the Eastern District of New York in Buck vs Board of Education of the City of New York, et al, and it is 71C 954. I do not have any other reference for it, but Judge Judd makes this comment --

THE COURT: Do you have a copy of that?

MR. ASHE: I can leave the copy that I have here, your Honor.

THE COURT: We can make a copy and get it back to you.

MR. ASHE: All right. He says, "Due process--"

THE COURT: After the end of the argument, give it to Mr. White and he will make a copy.

MR. ASHE: He says, "Due process of law should extend not only to the hearing, but to the decision. It is an unreal protection to deprive an employee of participation at the crucial point where the decision whether to fire or not to fire is made." Later on in his opinion he says, "The scope of due process includes the right to respond to a recommended decision before the final finding is made. It has been held in Selective Service matters

that a person should have the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and the arguments to be countered". He goes on to say that the New York Court of Appeals has recommended that a claimant should be given an opportunity to controvert the conclusions in reports before the body which has the final power of decision. There is also another recent case not dissimilar to the case before [illegible]'s Court which is cited in --

THE COURT: In the Selective Services cases there was a procedure where they used to have what they call conscientious objector hearing officers and they would make certain recommendations based upon summaries of FBI reports and I think these summaries were not shown to the registrant before the decision was made or at least that was the practice of some of the hearing officers and I think there was a case that held that that procedure was wrong because as you point out, the man

should have an opportunity to examine the report and comment on it before whoever the decision maker is, - he shouldn't make a decision.

MR. ASHE: I recall a case of that nature. I am not able --

THE COURT: Go ahead.

MR. ASHE: -- to discuss it. I would like to go back just briefly to another relatively recent case for which I do not have an official citation, from the District Court for the District of Delaware. It is dated August 26, 1974 and it is an opinion --

THE COURT: What is the title?

MR. ASHE: It is King, - Dennis P. King vs Caesar Rodney School District, et al. It is Civil Action No. 4607 and it is an opinion by Senior Judge Wright and he has a full section of his opinion which he has devoted to the question of impartiality and he cites cases from this circuit as evidence of the fact that the impartiality concept is something that is very strongly adhered to in this

circuit. He cites, for example, Winnick vs Manning and Simard vs Board of Education and he discusses those cases in his opinion and he concludes that there must be an impartial hearing panel at some point in time in the process.

THE COURT: The last time we were concerned about the fact that the attorney for the Board is also the attorney who processed and then when the final decision is made, he seemed to sit in and be with the Board. What happened in regard to this later hearing, - Mr. Kinsella?

MR. ASHE: With respect to the tenure hearing itself, the tenure hearing was handled by the firm which represented the Board of Education. In other words, the firm that represented the Board prosecuted the charges. With respect to the decision making process of the Board, Mr. David has filed an affidavit with this court indicating that he did not participate in those deliberations. I would submit that that does not necessarily dispose of the issue. I don't think that it is, -

that it would be an unusual thing for a client to consult an attorney outside of the realm of a, quote, meeting.

THE COURT: Do you think his affidavit is not explicit enough, is that it, for the record?

MR. ASHE: I would submit that it is not, your Honor.

THE COURT: How can that be cured, by deposition or what?

MR. ASHE: A deposition would be one way of handling that matter, your Honor. I am not sure that that factor, - if the Court comes to the conclusion that that factor alone is decisive of what result it may reach, then I think that a deposition might be helpful, but I do not think that that factor alone is going to be totally dispositive of the issues that we have raised at this point in time.

THE COURT: All right.

MR. ASHE: Now, Paragraph 25 of Mr. Kinsella's affidavit which is Motion 2 sets forth in detail many of the objections I have already alluded to so that the Court has

in one place basically the objections that we are making to the, quote, the Board's decision and to the panel decision itself.

THE COURT: All right.

MR. ASHE: I would like also again to draw the Court's attention to the Murtz decision which the court cited in its opinion and which is discussed again in our brief with respect to Motion 2 at Page 22 and we quote from it and I think that that decision very clearly explains why it is necessary to have the reasons.

I would like to turn now to the issue of the regulations itself. We are taking the position that the Regents and the Commissioner of Education do not statutorily have the power to adopt the regulations that were promulgated and that therefore, they have not complied with the court's opinion insofar as it required appropriate administrative and legislative action.

THE COURT: As far as that, is that something that this Court should decide or is that

something that ought to be thrashed out in the state court?

MR. ASHE: I think that is something that this Court should decide, your Honor, for the simple reason that we have here a case which has been decided. This Court has issued an injunctive order. The question that is being raised by these regulations is whether they comply with that order and I think only this Court can decide that question and in doing so, it may have to decide what may to some extent be a state issue, but I don't think that it is a state issue in its totality. I think it is a question also of whether it provides the rudimentary due process that the court deemed to be required in its original opinion as expanded by the court's opinion in Arnett.

I would like to call the Court's attention particularly to the statute itself which is set forth in the court's opinion at Footnote 2. I would like to call the Court's attention to two specific parts of that footnote. One is Section 3

of the statute, Section 3(c), the very last sentence, which reads, "A copy of the transcript of the hearing shall upon request be furnished without charge to the employee involved", and that was an express statutory requirement put in by the Legislature. If the Legislature had desired that state funds be expended to provide transcripts to parties other than the employee, I think the statute would have said so. I don't think the statute can be amended by regulation. I think that that language has to be read as a limitation on the power of the Commissioner of Education.

Turning then to Section 4 which deals with post hearing procedures, a comparison of that section with Section 3 makes it very clear as we have discussed in our brief that the Legislature was delegating to the Commissioner of Education purely ministerial functions and it was not giving him any discretionary power to amend or otherwise modify the statutory language.

Section 4 deals expressly with the powers of a Board of Education in the context of a teacher dismissal. Section 3 deals expressly with the conduct of the panel hearing only. Section 3 is the only section that gives expressly to the Commissioner of Education any kind of duties whatsoever. Section 4 is addressed strictly to the Board of Education.

I think that as the Court may recall at the time it originally heard this case there was another decision on the issue of suspension which had been decided by a state court, the Jerry case, Jerry vs Board of Education of Syracuse and the court took note on that decision and thought that it was a rather surprising decision. That case has now found its way all the way to the Court of Appeals and I think that the Court of Appeals language in its decision is also of importance here with respect to interpretation of the statute, particularly since it interprets a portion of this statute which is before the Court.

Now, looking at the statutory language, 3020(a)(2) says that an employee may be suspended pending a hearing on the charges and the final determination thereof. 3020(a)(5) says, - I am sorry, 3020(a)(4) says, the very last sentence, if the employee is acquitted, he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record. Now, despite the fact that we took that up to the Court of Appeals on the constitutional question as to whether or not there could be a suspension without pay prior to hearing the court ducked the constitutional question but found expressly that the statute did not permit a suspension without pay and it did so in this language, "We are not unaware that a sufficient predicate for withholding has been found by some in the indirect reference to suspension without pay contained in Subdivision 4 that, 'If the employee is acquitted, he shall be restored to his position with full pay for any period of

suspension.' To the assertion that one should infer from this phrase an intention on the part of the Legislature to confer authority to withhold we would join that had there been such an intention, the easy and normal manner of its expression would have been to include an explicit appropriate provision, therefore, in Subdivision 2", and I think the Court is saying that it is going to read the statute since it is a statute which materially affects protected interests in a very strict fashion and it is not going to read into the statute things that are not there and I think that the regulations adopted by the Commissioner attempt to read into the statute things that are not there.

Now, I would like to go back just a moment for that very reason again to the exhibits.

THE COURT: I wanted you to highlight. You have been talking for some time and I have a jury coming in at 3:00. All I can do is highlight here because I have to read all these cases.

MR. ACHE: I understand that.

THE COURT: I would like to listen to Mr. Cream if I could.

MR. ACHE: I am just about finishing, your Honor.

THE COURT: I don't want you to leave anything out you think is important.

MR. ACHE: I think something that is important is the manner in which the agency itself views its regulations. In looking at the exhibits attached to my affidavit, Exhibit D and Exhibit E, Exhibit D constitutes the amendments to the regulations of the Commissioner of Education. Exhibit E is a letter of, - from the Department of Education to participants in pending proceedings under 3020(a). I think it is significant to note that despite its amendments that the Department views its amendments as doing only three things, allegedly. One is that the Board of Education would be provided with a transcript. Two is that the Board would be required to render a written decision setting forth the reasons and

the factual basis for its determination, and three, that such determination of the Board would be based solely upon the records of the proceedings before the hearing panel. Despite the, - as I indicated earlier, - the reference in the Court's opinion to the fact that the panel also should write a decision, I think it is clear from the agency's own explanation of its regulations that it does not require that the panel write a decision or in any way explain how it reaches the result that it reaches.

I think the issue of vagueness we have discussed in our brief. I think that Arnett reopens that issue. Very briefly, six members of the court found the statute at issue in Arnett not to be vague solely because there existed regulations explaining its meaning. There are not and never have been any regulations explaining the section of the statute, Section 3012 that we originally challenged.

Beyond that comment, I will leave

the basic argument on that issue to the briefs. I think what it boils down to at this point in time is this question, whether in the light of all of these questions that we have raised with respect to impartiality, with respect to not having an opportunity to challenge the panel's decision, with respect to their not being an impartial decision maker where the Board is in essence so intertwined in the initiating process that it cannot be impartial; the mode of adoption of the regulations; whether in light of all these things the statute is still unconstitutional, still unrehabilitated and therefore still enjoined, and that all action taken pursuant to that statute is null and void and that the plaintiff therefore is entitled to be returned to his job and compensated for any loss of earnings that he has had, and the state is continually enjoined until such time as appropriate legislative action is taken, because I think it is clear from the statute that it is

impossible because of the language of the statute, because of the comments made by the Court of Appeals, the New York Court of Appeals in its opinion in Jerry as to how it was viewing this particular statute for the Commissioner of Education to adopt any regulation which would in any fashion rehabilitate the statute.

THE COURT: Mr. Cream.

MR. CREAM: May it please the Court, your Honor, I see this case a little differently than does Mr. Ashe. I believe I have just heard the entire matter of the constitutionality of Section 3020(a) of the Education Law essentially re-argued before a single judge. The three-judge court, of which of course your Honor was a member, heard all of these arguments and rendered its decision. The issue then that is now before this Court is whether the decision was complied with by both of the parties defendant in the prior lawsuit. Plaintiffs say it was not complied with by the state in that the regulations which were promulgated were promulgated

illegally. They say further that it was not the three-judge court's decision was not followed by the school board defendants for certain reasons.

My responsibility, of cours, your Honor, is simply with reference to the manner in which the regulations were promulgated and I will address myself to that.

The three-judge court held that Section 3020(a), - I am reading now from the court's opinion, - Section 3020(a) of the Education Law of the State of New York is unconstitutional absent administrative regulations requiring certain things. Those administrative regulations were promulgated, passed and became effective and implemented. Nowhere, your Honor, in the motion relative to this issue nor in the first brief relative to the issue nor today have I heard anything to suggest that on the face of the regulations promulgated they do not comply with the intent of this court's order, as indeed they do comply with the court's

intent. In fact, they almost use the court's language itself.

They are therefore arguing, your Honor, that the regulations should not be permitted to stand because they were promulgated in an unconstitutional fashion and it is that argument, your Honor, to which this Court has no subject matter jurisdiction and to which plaintiffs have no standing. The regulations were not even in effect at the time of the three-judge court and therefore, the manner in which regulations could be promulgated were certainly not an issue before the court then.

Furthermore, there is no allegation that the manner in which they were promulgated prejudiced the plaintiffs. For example, if a regulation required a public hearing before promulgation where people could attend and could speak and this plaintiff was denied that right, then we could say that perhaps he has been prejudiced. There is no allegation in any way that the plaintiff has been

prejudiced by virtue of the manner in which the regulations were promulgated.

I would point to your Honor that these same attorneys, counsel for plaintiff, challenged the manner in which the regulations were promulgated in the state court where the challenge belongs and the Supreme Court held that the regulations were promulgated within the authority of the Commissioner of Education and I cited your Honor to the case in my affidavit. They had then and they remain the right to take that matter to the Appellate Division and then on to the Court of Appeals to challenge what is essentially a state function.

While it is true that the United States Code, Section 2202 does confer certain continuing jurisdiction upon a court in a matter where injunctive relief is granted, that does not confer upon it jurisdiction which it would not ordinarily have had and if plaintiffs had come into this court complaining that the promulgation of this regulation was unconstitutional,

they would be unable to show standing and they would be unable to show a federally protected right and this Court, I believe, would sustain a motion to dismiss on the basis of standing and on the basis of jurisdiction.

Your Honor, this essentially is the thrust of what my affidavit suggested. It is the thrust of what my letter brief brought before the Court and I frankly have nothing further to add other than to say that if the Court somehow found that there was subject matter jurisdiction for this issue, promulgation of the regulation, it is clearly the sort of issue to which an abstention doctrine applies, particularly because the plaintiff has already initiated a state court review. He has already gone, - I am sorry, strike that. It is not the plaintiff, but the issue has been brought to the state court. The first step has been decided upon against him and he has only to perfect his appeal to the Appellate Division since the notice of appeal is already filed to have the

intermediate Appellate Court rule and it is a short step from there, your Honor, to the highest court in the State of New York to give the New York courts the opportunity to examine his constitutional arguments and it is on that basis, your Honor, that we feel that the three-judge court's order has been fully complied with by the Commissioner of Education and that there is no further jurisdiction need for a one-judge court or any need for a three-judge court to continue the matter.

THE COURT: Mr. Ashe and Mr. Cream, you are making this argument to a single judge. If in fact the unconstitutionality of the procedure is for the federal court that would have to go to a three judge.

MR. CREAM: It would, Judge.

THE COURT: If I decide that it ought to be decided by the state court, of course, I can make that decision or I can refer it to the three-judge court.

MR. CREAM: Your Honor, I think --

THE COURT: I am sort of getting the cart before

the horse.

MR. CREAM: I think clearly a single judge may dismiss it for lack of standing or jurisdiction. There is no question about that.

THE COURT: Mr. Ashe, is there any waiver here? You had the order. The defendants had the order here, changed the regulation, so they changed the regulation and then we went ahead and had the hearing. It appears to me that if you thought that that was unconstitutionally promulgated, it would save everybody a lot of time and trouble and everything else, that something could have been done then, you know, either come back here, go to the state, but I think the other thing is that the defendant is in sort of a, let us say, we say you may do thus and so, or you may not do thus and so unless you change the regulations, so then they went ahead and under our direction they changed the regulation. I would think that if our directive, if it was an improper directive, it might have been more helpful

to have that thrashed out before we had all the hearings.

MR. ASHER: I think several things in response to your Honor's questions. One is that the, - I don't think that there is a question of waiver. I think that there has, - that the question of whether or not within the framework of the guidelines, - let me put it this way; - the duty is upon the Board of Education to provide due process to the teacher irrespective of what the Commissioner of Education does. Now, with respect to that issue within the framework of the Court's opinion, it was possible for this defendant Board of Education to provide to the plaintiff due process.

Now, I would take the position that no Board of Education is required to engage in an unconstitutional act and if the Board assumed or the Board felt that a particular procedure, even though it may have been suggested by the Commissioner of Education, did not comply with this Court's order, then it had a duty to

adopt a procedure that would comply with this Court's order, that it would not necessarily be bound by the regulations of the Commissioner and to that extent, we proceeded to go through the hearing and we raised certain objections as the hearing progressed as the transcript of that proceeding reflects. We have reached a result now where it is clear both from the panel decision and from the Board decision that the very basic concept that this Court expressed in its opinion, that of requiring a written decision which would provide a reviewable base, has not been complied with. I think that is separable from whatever the Commissioner may have done. You have two defendants here. Each of them has a duty.

THE COURT: Mr. Ashe and Mr. Cream, I have to go through the papers here and I will consider the arguments. I will consider this submitted.

MR. CREAM: Thank you, your Honor.

(Proceedings herein concluded.)

* * *

RUTH T. NOEL & E. F. KNISLEY
OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DECISION AND ORDER DENYING
DENYING MOTIONS FOR SUPPLEMENTARY RELIEF

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff

-vs-

Civil 1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants

APPEARANCES: BERNARD F. ASHE, ESQ. and JAMES R. SANDNER, ESQ., Albany, New York, for Plaintiff.

OHLIN, DAMON, MOREY, SAWYER & MOOT (JAMES S. McASKILL, ESQ., of Counsel), Buffalo, New York; THOMAS L. DAVID, ESQ., Buffalo, New York, for Defendant Central School District No. 7.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (DOUGLAS S. CREAM, ESQ., Assistant Attorney General, of Counsel), for Defendant Nyquist.

Plaintiff Donald M. Kinsella, a tenured school teacher employed by defendant school district, originally brought suit to declare §3020-a of the New York Education Law unconstitutional. That section outlines the procedures to be followed in a dismissal hearing. In a decision dated February 19, 1974, a three-judge district court held

Please note: There is no page 358. It has not been omitted from the record.

§3020-a unconstitutional because it did not require the decision of the Board of Education to be based exclusively on evidence produced before the hearing panel, and because the Board did not have to state the factual basis and the reasoning on which it based its decision. Kinsella v. Board of Education, 378 F.Supp. 54 (W.D.N.Y. 1974). The court granted plaintiff his request for an injunction, stating that "defendants are enjoined from its [3020-a] enforcement until such time as appropriate administrative or legislative action is taken to remedy the defects in the procedures here involved." 378 F.Supp. at 60.

Neither side appealed the decision. On February 28, 1974 the New York State Board of Regents approved amended regulations, proposed by the Commissioner of Education, that conformed §3020-a to the three-judge court's decision. 8 N.Y.C.R.R. 82.10(h), 82.11 (as amended, February 28, 1974).

Thereafter, the tenure hearing which had been enjoined by the court's order was resumed, with the plaintiff participating. The hearing panel reported its recommendations to the Board of Education; the transcript of the hearing was forwarded to the Board; and the Board then

rendered its decision dismissing plaintiff on July 25, 1974.

On November 22, 1974 plaintiff brought these motions for supplementary relief. In motion I, plaintiff claims that the injunction against implementation of §3020-a is still in force because the new regulations of the Board of Regents were not legally approved under New York statutes. He asks that those amended regulations and the hearing held under them be declared void. Plaintiff does not challenge the content of the amended regulations in motion I, only the procedures by which they were enacted. In motion II, plaintiff argues that Arnett v. Kennedy, 416 U.S. 134 (1974), requires further protections to be accorded the plaintiff, and that the tenure hearing procedures and the tenure hearing itself lacked due process.

Plaintiff originally brought this action under 42 U.S.C. §1983, with jurisdiction under 28 U.S.C. §1343(3),(4). A three-judge district court was convened pursuant to 28 U.S.C. §2281. 1/

Plaintiff argues in motion I that this court should exercise its discretion and decide the state law

issue under the pendent jurisdiction doctrine. The parameters of the court's discretion under the pendent jurisdiction doctrine are far from precise. But, for reasons stated below, this court declines to review the legality of the amended regulations. 2/

Numerous factors influence a court in considering a pendent jurisdiction question. There must exist a federal claim of sufficient weight to give the court jurisdiction and both the state and federal claims must be based on essentially the same facts. The claims must be so related that they present the court with one constitutional "case." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Other factors to consider are judicial economy and convenience and fairness to litigants. But, even if these factors are present, the decision is still discretionary with the court. Gibbs, at 726.

In this case plaintiff's claim in motion I is not truly pendent to a constitutional claim. The question presented by it, though related to plaintiff's original action, is a by-product of that case. In the original

action, plaintiff argued that §3020-a was unconstitutional because of intrinsic due process shortcomings in the provided procedures. And in motion II, plaintiff argues that there are still constitutional defects in the procedures themselves. But the state law issue presents a separate question - whether the dismissal procedures were properly amended under state law. This does not present this court with one constitutional "case." See Gibbs, supra.

In footnote 4 to the three-judge court decision, notice was taken of the then pending Supreme Court ruling in Arnett v. Kennedy. In that case the discharge procedures for federal competitive service employees under the Lloyd-La Follette Act, 5 U.S.C. §7501, were being challenged. The Kinsella court said that "[s]ince the provisions of §3020-a resemble, in some respects, those of 5 U.S.C. §7501, our decision here will have to be applied with deference to the Court's decision when handed down." 378 F.Supp. 54, 59 n.4 (W.D.N.Y. 1974). The Supreme Court decided Arnett on April 16, 1974.

This court initially looks at plaintiff's request for a re-convening of a three-judge court. A

prerequisite to a three-judge court is a substantial federal question. Ex parte Poresky, 290 U.S. 30, 31 (1933). The judgment on the substantiality of the federal claim is within the province of the single judge district court. 290 U.S., at 32.

The Supreme Court recently discussed the question of "constitutional insubstantiality":

> "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," Bailey v. Patterson, 369 U.S., at 33; "wholly insubstantial," ibid.; "obviously frivolous," Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); and "obviously without merit," Ex parte Poresky, 290 U.S. 30, 32 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281.
> Goosby v. Osser, 409 U.S. 512, 518 (1973).

Arnett v. Kennedy upheld the challenged discharge procedures of the Lloyd-La Follette Act. That

decision by the Court would appear to obviate the cautionary statement by the Kinsella court in footnote 4. The plaintiff here argues, however, that if the Arnett opinion is carefully dissected, it still calls for stricter procedural due process safeguards than Kinsella and that, therefore, these safeguards must be read back into Kinsella's holding. After close study of Arnett, we think the federal question posed by plaintiff in this action is insubstantial and does not merit the review of a three-judge district court.

The Arnett case produced five separate opinions spanning ninety-five pages. Mr. Justice Rehnquist announced the plurality opinion of the Court. He, Chief Justice Burger, and Justice Stewart agreed that

> [T]he Lloyd-La Follette Act, in at once conferring upon nonprobationary federal employees the right not to be discharged except for "cause" and prescribing the procedural means by which that right was to be protected, did not create an expectancy of job retention in those employees requiring procedural protection under the Due Process Clause beyond that afforded here by the statute and related agency regulations.
> 416 U.S. 134, 163 (1974).

Mr. Justice Powell and Mr. Justice Blackmun also agreed that no procedural due process violation occurred, but for different reasons. They argued that the due process standard, by which the discharge procedures must be tested, cannot be defined by the statute which established the employees' position: "This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee." 416 U.S., at 167. The real question to be answered, they argued, was whether due process required a full evidentiary hearing before final removal. The Justices ruled it did not. Noting that a balancing process had to be applied between the governmental and private interests asserted,[3/] these two Justices held that the Lloyd-La Follette procedures were consistent with constitutional due process norms.

Justice White, in a separate opinion, likewise reached the conclusion that "[w]hile the State may define what is and what is not property, once having defined those rights the Constitution defines due process."

416 U.S., at 185. Before a competitive civil service employee could be finally terminated, Justice White held, due process required a hearing. Since the Lloyd-La Follette Act provided for a full trial type hearing before final termination, Justice White concluded that the Constitution and the law "converged."

As this court reads the Arnett scorecard, these six Justices ruled the Lloyd-La Follette Act's dismissal procedures constitutionally sufficient, though for different reasons. Do any of these different reasons affect the Kinsella decision? Mr. Justice Powell does point out in his opinion that the Lloyd-La Follette Act mandates written notice of charges be given to the employee thirty days before removal. This affords the employee an opportunity to answer the charges and try to persuade the official not to dismiss him. A full hearing is then held, post dismissal. 416 U.S., at 170.

The §3020-a procedure is not identical to the Lloyd-La Follette Act, nor does the Arnett case require it to be. Under §3020-a, no dismissal can be final without a hearing. Whether or not the Arnett case requires written charges to be given the employee in all dismissal

procedures under any type of statute, before any type of suspension can be imposed, does not need to be decided at this time. Mr. Kinsella was given written notice of the charges against him, before his hearing, and he was not suspended[4/] prior to the termination hearing. The Arnett case has not provided this plaintiff with a substantial constitutional claim under the Kinsella decision in this regard.

The plaintiff also argues that the Board of Education is not an impartial hearing examiner, as due process requires, because the Board decides both the initial probable cause question and the final determination on dismissal. The three-judge court found no due process violation in this procedure. 378 F.Supp., at 60. The effect of the Arnett decision on this matter does not raise a substantial federal question. The Court in Arnett dealt with the situation where the hearing examiner himself was the target of the employee's behavior that was the basis for the charges against the employee. Such is not the situation here. In any event, Justice White noted that the Court "need not hold that the Lloyd-

La Follette Act is unconstitutional for its lack of provision of an impartial hearing examiner." 416 U.S., at 199.

Neither does the Arnett case raise a substantial federal question with respect to plaintiff's claim that the hearing must be actually held before the body that finally determines the issue. The Kinsella decision mandated changes in the procedures to insure that the Board's decision was based on evidence produced before the hearing panel. In this respect the hearing panel is akin to a special master. See Buck v. Board of Education, _____ F.Supp. _____ (E.D.N.Y. 1974).

Finally, the plaintiff claims that the Board of Education's decision is so deficient in content as to be violative of the Kinsella court's mandate that it be "based upon evidence elicited before the hearing panel and the decision of the Board to set forth the reasons and factual basis therefor." 378 F.Supp., at 60. Under Kinsella and Arnett, and previous Supreme Court cases, this does not raise a substantial constitutional question either.[5/]

For all the reasons stated above, this court denies both plaintiff's motions for supplementary relief.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: October 21, 1975

FOOTNOTES

1/ On this application for supplementary relief, plaintiff cites 28 U.S.C. §2202 as his jurisdictional basis. This section does not confer jurisdiction on any court. It merely creates a remedy:

> [T]he Declaratory Judgment Act is not a jurisdictional statute. It does not create subject matter jurisdiction where none otherwise exists. It only creats [sic] a particular kind of remedy available in actions where the district court already has jurisdiction to entertain a suit.
> Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir. 1970).

2/ It is noteworthy to point out that subsequent to the three-judge court decision, but before the plaintiff's motions for supplementary relief, two other tenured school teachers sought in state court to enjoin another school district from proceeding under the same revised regulations that are attacked here. It was there argued that the regulations were illegally amended and therefore void under Kinsella. That court ruled that the actions of the Commissioner of Education and the State Board of Regents in amending §3020-a were proper. Hodgkins v. Cent. School Dist. No. 1, 355 N.Y.S.2d 932 (Sup.Ct., Broome Co. 1974), aff'd, _____ App.Div.2d _____ (3rd Dept., June 12, 1975). The Appellate Division's unanimous decision declared that "[t]he regulations . . . are clearly within the scope of these . . . powers which the Legislature has granted to the Commissioner and the Board of Regents under the Education Law." Slip op. at 4, _____ App.Div.2d _____ (1975).

3/ See Goldberg v. Kelly, 397 U.S. 254, 262-266 (1970).

4/ The New York Court of Appeals recently held that §3020-a does not permit suspension of a teacher without pay. Jerry v. Bd. of Ed., 364 N.Y.S.2d 440, 35 N.Y.2d 534 (1974).

5/ Goldberg v. Kelly, supra, involved welfare fair hearings:

> [T]he decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. [Citations omitted.] To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, [citations omitted] though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. 397 U.S., at 271.

JUDGMENT DATED OCTOBER 21, 1975

JUDGMENT ON DECISION BY THE COURT — CIV. 32 (7-63)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 1973-187

DONALD M. KINSELLA

vs.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable , United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that both of plaintiff's motions for supplementary relief are denied.

Dated at Buffalo, New York, this 21st day of October, 1975.

JOHN K. ADAMS

JOHN K. ADAMS
Clerk of Court

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff,

-against-

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, et. al.,

Defendants.

NOTICE OF APPEAL

Civil No. 1973-187

NOTICE IS HEREBY GIVEN that DONALD M. KINSELLA, plaintiff in the above named action, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order and Decision of District Judge John T. Curtin, and the Judgment entered thereon, denying both plaintiff's motion for supplementary relief, entered in this action on October 24, 1975.

Dated: November 14, 1975
Albany, New York

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